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Supreme Court of the United States

OCTOBER TERM, 1961

No. 124

THE CREEK NATION OF INDIANS,
Petitioner

v.

THE UNITED STATES,
Respondent

BRIEF FOR THE CREEK NATION, PETITIONER

THE CREEK NATION, Petitioner

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OPINIONS BELOW

The opinion of the Indian Claims Commission is reported at 7 Ind. Cl. Comm. 117, 127 (R. 264-283). The opinion of the Court of Claims of March 1, 1961 is not yet reported (R. 292-315).

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1961 (R. 292). The petition for a writ of certiorari was filed on May 29, 1961, and was granted on October 9, 1961 (R. 315).

The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1), and Section 20(c) of the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049, 1055; 25 U. S. C. Section 70s).

TREATIES AND STATUTES INVOLVED

The Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049 (25 U. S. C. 70-70v), provides in pertinent part as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.
>
> "All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.
>
> "In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the

Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, * *."

* * * *

"Sec. 20(b). When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

"(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended."

The pertinent provisions of the treaties and statutes involved in the claims of petitioner are printed as a part of the Statement, or are set forth in the Appendix, pp. 78-84.

QUESTIONS PRESENTED

1. Whether the United States has an obligation to render a clear and accurate accounting of its dealings and the fulfillment of its treaty obligations owing to an Indian tribe in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race; or whether the United States is merely in the position of a debtor in its relationship under a treaty with an Indian tribe.

In other words, whether a fiduciary relationship exists between the United States and an Indian tribe (in this case the Creek Nation of Indians) requiring the United States to account strictly to the Indian tribe for the amounts disbursed by the United States in fulfillment of its treaty obligations; or whether the relationship is merely that of debtor-creditor.

2. Whether an Indian tribe can rely upon admissions contained in an accounting made by the accounting officers of the United States showing that the United States had failed to fulfill its treaty obligations to said tribe, and that balances are due and owing to the tribe under said treaty obligations of the United States.

3. Whether the United States has the burden of proving the credits it claims against amounts shown by its accounting to be due and owing an Indian tribe under treaty stipulations between the United States and an Indian tribe.

4. Whether the Court of Claims has discharged its duty as an appellate court under Section 20(b) of the Indian Claims Commission Act, when it, by a mere per

curiam statement, affirms the findings and opinion of the Indian Claims Commission in a case wherein appellant raises serious objections with respect to the failure of the Commission to find facts essential to the proper disposition of the claims presented, or found facts which were not supported by substantial evidence, or which were contrary to the record, when the above Act directs that the Court "shall" review the whole record and settle such questions.

5. Whether a denial of a writ of certiorari by this Court constitutes an approval of the decision of the lower court.

STATEMENT

The petitioner, the Creek Nation of Indians, brought an action before the Indian Claims Commission under the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049 (25 U. S. C. §§ 70-70v), to recover for certain unfulfilled obligations of the United States under five treaties between the Creek Nation and the United States.

Petitioner (plaintiff-appellant below) alleged that the full amounts which the United States was obligated to pay to the Creek Nation as considerations due for cessions of Creek lands under these treaties were not in fact paid in full, and petitioner claimed the right to recover the unpaid balances (R. 1-6).

The United States answered denying that any sums were due, owing and unpaid under the treaties in question, "and that all of said funds were paid, administered and disposed of for the use and benefit of plaintiff, and in fulfillment of the stipulations of the treaties referred to by plaintiff" (R. 7-14). It also presented defenses of res judicata and release, which the Indian Claims Commission did not consider in deciding the case, because it held that petitioner had not proved its case (R. 273, 282).

The Creek Nation relied upon and introduced in evidence before the Indian Claims Commission pertinent extracts from a report of the Government's own General Accounting Office setting forth in detail all treaty payments made by the United States to the Creek Nation under the treaties in question, shown by the records which were maintained solely by the Government, and now in the custody of the General Accounting Office. In other words, the Creek Nation relied solely upon the accounting of disbursements under these treaties made by the Government's own accounting officers, and the admissions made therein showing that balances were due the Creek Nation under these treaties. The Government's accounting does not specifically show that the entire amounts due under the treaties in issue were paid to the Creek Nation in accordance with the stipulations of the United States in these treaties (R. 15-138, 295).

The claims under the several Creek treaties are set forth below.

Claims Under Treaties of 1802 and 1805

Petitioner originally presented independent claims under the Creek Treaties of 1802 and 1805. However, in deciding this case the Indian Claims Commission combined these claims, and we will follow this course in reviewing their treatment by the Commission, and Court of Claims.

Article II of the Treaty of June 16, 1802, between the Creek Nation and the United States, proclaimed January 11, 1803 (7 Stat. 68, 2 Kapp. 58) provided in part as follows:

> "The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek Nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and

> one thousand dollars for the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek Nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. • • •"

Article IV of said treaty provided:

> "The contracting parties to these presents, do agree that this treaty shall become obligatory and of full effect so soon as the same shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof."

This treaty became effective on January 11, 1803, the date of its proclamation by the President (R. 266). Thereunder the United States was obligated to pay to the Creek Nation said perpetual annuity of $3,000.00 per annum beginning with the year 1803 through the fiscal year 1902 (R. 266), when this permanent annuity was funded under the Act of May 27, 1902 (c. 888, 32 Stat. 245, 249, 250) — a period of 100 years, less the Civil War period of six years (fiscal years 1862 through 1867).*

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* The Creek Nation eliminated from this case any claim for annuity payments due from the United States during the Civil War period, or for the fiscal years 1862-1867, 6 years, this period being covered by separate petition (R. 266).

The parties agreed that the total obligations of the United States under said Article II were as follows (R. 266-267):

Permanent annuity of $3,000.00 per annum for 94 years	$282,000.00
Annuity to chiefs, $1,000.00 per annum for 10 years	10,000.00
In goods and merchandise, receipt of which was acknowledged	10,000.00
To satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States	10,000.00
To satisfy claims for property taken by individuals of the Creek Nation from citizens of the United States subsequent to the Treaty of Colerain (1796)	5,000.00
Total	$317,000.00

The report of the Government's General Accounting Office shows that $254,690.25 only was disbursed by the United States to the Creek Nation in fulfillment of its treaty obligations under said Article II, as set forth below (R. 44-49, 119, 266-267, 274, 295-296):

Depredations	1806-1811		$ 3,290.25
Cash payments to Chiefs	1805, 1811		700.00
Cash annuity	1819-1836	$55,500.00	
	1837, 1839-1841, 1843, 1846-1861, 1868-1869	66,000.00	
	1844-1845	6,000.00	127,500.00
Cash payments to Creek Treasurer	1861, 1868-1898		99,000.00
Support of Creek Children at Choctaw Academy, with consent of Creek Chiefs	1831		2,200.00
Disbursed for benefit of Creek Nation, 4 years at $3,000.00	1899-1902		12,000.00
Goods and merchandise distributed at treaty council and receipted for in treaty	1802		10,000.00
	Total disbursed		$254,690.25

The record thus showed that the United States failed to account to the Creek Nation for the balance due under said Article II, and the Creek Nation limited its claim to the amount of $62,309.75 which the accounting report showed was due and owing from the United States to the Creek Nation under said treaty obligations of the United States.

On this record the Indian Claims Commission made the following finding of fact (R. 267):

> "Plaintiff admits the payment and disbursement by the United States to the Creek Nation on said treaty obligation and in the amount of $254,690.25 (as itemized in its Req. Find. No. 4) and claims a balance due under said treaty obligation in the amount of $62,309.75."

Petitioner challenged the sufficiency of this finding on appeal to the Court of Claims (R. 284, 286), because it merely stated petitioner's claim without determining whether or not the record supported the claim.

Article III of the Treaty of November 14, 1805, between the Creek Nation and the United States, proclaimed June 2, 1806 (7 Stat. 96, 2 Kapp. 85), provided as follows:

> "It is hereby stipulated and agreed, on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Oemulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonally signified from time to time, though the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the term of the ten succeeding years, making in the whole, eighteen payments in the course of eighteen years, without interest. The first payment is to be made as soon

as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Ocmulgee fields."

Article V of said treaty provided in part:

"• • • and this convention shall be obligatory on the contracting parties as soon as the same shall have been ratified by the government of the United States."

Said treaty became effective on June 2, 1806, when proclaimed (2 Kapp. 85; R. 269).

The parties agreed that the total obligations of the United States under said Article III were as follows (R. 269):

$12,000.00 annually for 8 years in money, or goods, and implements of husbandry, at the option of the Creek Nation	$ 96,000.00
$11,000.00 annually for 10 succeeding years, to be paid in like manner	110,000.00
Total	$206,000.00

The report of the Government's General Accounting Office shows that $169,452.25 only was disbursed by the United States to the Creek Nation in fulfillment of its treaty obligations under said Article III, as set forth below (R. 51-52):

Cash annuities	1811, 1815, 1817-1823	$128,667.45
Annuities in goods	1811, 1815	40,784.80
	Total disbursements	$169,452.25

The United States thus failed to account to the Creek Nation for the balance due under said Article III, and the Creek Nation limited its claim to the amount of $36,547.75, which the Government's accounting report showed was due and owing from the United States to the Creek Nation under said treaty obligations of the United States.

On this record the Indian Claims Commission found that (R. 269):

> "The report of the Accounting Office shows annual appropriations to fulfill the above obligation, but disbursements definitely allocated to the fulfillment of the obligations of this treaty are in the amount of $169,452.25."

Although the Commission did not so find, it is obvious that the amount due and owing to petitioner under said Article III was admittedly the difference between the total treaty obligation of the United States, or $206,000.00, and the total disbursements of the United States thereunder, or $169,452.25, leaving the balance of $36,547.75 due the Creek Nation under this treaty provision.

The total amount claimed by petitioner under the Treaties of 1802 and 1805 was $98,857.50 (R. 267, 269, 274-275, 295-296).

In an endeavor to overcome the above balance of $98,857.50 shown by its accounting report to be due the Creek Nation under the Treaties of 1802 and 1805, the United States took out of context certain unallocated expenditures for the years 1803 through 1809, totaling $77,263.45, for goods purchased and forwarded from Philadelphia for Creek Indians, which the Government's own accounting report sets up as possible disbursements in fulfillment of an earlier Treaty of August 7, 1790 (7 Stat. 35, 2 Kapp. 25), between the Creek Nation and the United States, *which was not in issue*, and which expenditures the accounting report did not and could not specifically allocate to the Treaties of 1802 and 1805 in issue (R. 23-24).

The United States had assumed obligations to the Creek Nation under the Treaty of August 7, 1790, proclaimed August 13, 1790 (7 Stat. 35, 2 Kapp. 25), which were as follows:

> "Article II. The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do

acknowledge themselves, and the said parts of the Creek Nation, to be under the protection of the United States of America, and of no other sovereign whosoever; * *

* * * *

"Article IV. * * it is hereby agreed, in addition to the considerations heretofore made for the said land, that the United States will cause certain valuable Indian goods now in the state of Georgia, to be delivered to the said Creek nation; and the said United States will also cause the sum of one thousand five hundred dollars to be paid annually to the said Creek nation. * *

* * * *

"Article XII. That the Creek nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will from time to time furnish gratuitously the said nation with useful domestic animals and implements of husbandry. And further to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, the United States will send such, and so many persons to reside in said nation as they may judge proper, and not exceeding four in number, who shall qualify themselves to act as interpreters. These persons shall have lands assigned them by the Creeks for cultivation for themselves and their successors in office; but they shall be precluded exercising any kind of traffic.

* * * *

"Article XIV. This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall have been ratified by the President of the United States, with the advice and consent of the Senate of the United States."

This treaty became effective when proclaimed on August 13, 1790. (2 Kapp. 25).

Furthermore, the United States assumed other obligations under Secret Articles of said Treaty of August 7, 1790, and thereunder obligated itself to pay to each of

the 6 medal chiefs of the Creek Nation $100.00 annually, and to the Creek Chief, Alexander McGillivray, for his services as the agent of the United States, $1,200.00 annually, during their lifetimes (Appendix p.8c).

So the total definite obligations of the United States to the Creek Nation under the Treaty of 1790, and the secret article thereof, amounted to $3,700.00 annually (R. 195-199); and under Article XII the United States further agreed to furnish the Creek Nation with domestic animals and implements of husbandry without limitation as to the amount for such disbursements.

The General Accounting Office report completely overlooked the obligations of the United States under the secret article of the Treaty of 1790, and accounted only for the perpetual annuity of $1,500.00. However, it did not begin to account regularly for the $1,500.00 permanent annuity until the year 1811 (R. 23-24, 36). In endeavoring to explain its failure to account for this permanent annuity during the period 1790 through 1810, the General Accounting Office report stated (R. 23-24):

> "In connection with the annuities due the Creek Nation of Indians under the aforesaid Treaty of August 7, 1790, it may be stated that while a careful search of the records of the General Accounting Office failed to disclose the amounts disbursed in the purchase of annuity goods for the Creek Indians during the years 1790 to 1809, said search did disclose that some annuity goods were furnished said Indians during said period. An examination of the ledgers and journals of the office of the Accountant for the War Department, the records of the storekeeper at Philadelphia (now on file in the General Accounting Office), and various records found with the old miscellaneous papers on file in the Office of Indian Affairs, indicates that goods valued at $1,500.11 were shipped from Philadelphia to the Creek country, on May 20, 1797, and that goods valued at $1,500 and $1,499.02 were actually delivered to the Creek Nation of Indians during the years 1798 and 1799, respectively. Said

examination also discloses that goods of the following values were forwarded from Philadelphia for the Creek Indians during the following years:

Year	Value of goods	Remarks
1800	$1,500.34	Annuity for year 1800
1803	3,000.00	Annuity for Creeks
1803	1,008.08	Goods for Creek chiefs
1804	4,159.84	Annuities for Creeks
1804	1,100.07	Goods for Creek chiefs
1805	4,000.24	Annuities for Creeks
1805	500.16	Goods for Creek chiefs
1805	4,000.00	Annuity for year 1805
1806	6,000.50	Annuity for year 1806
1806	6,673.85	Annuity for year 1806
1807	1,000.08	Goods for Upper Creek chiefs
1807	499.05	Goods for Lower Creek chiefs
1807	6,025.06	Annuity for Upper Creeks
1807	5,999.39	Annuity for Lower Creeks
1808	7,646.46	Annuity for Upper Creeks
1808	8,250.45	Annuity for Lower Creeks
1808	501.38	Goods for Lower Creek chiefs
1808	499.90	Goods for Upper Creek chiefs
1809	500.41	Goods for Upper Creek chiefs
1809	348.98	Goods for Lower Creek chiefs
1809	7,300.40	Annuity for Upper Creeks
1809	7,749.64	Annuity for Lower Creeks
1809	508.51	Annuity for year 1809

Said examination also discloses that moneys were advanced to disbursing officers for payment of salaries of interpreters for the Upper and Lower Creeks. During the years 1790 to 1809, various amounts were advanced to disbursing officers for annuities, but due to the fact that in most instances the names of the tribes for which the annuities were intended are not set out, it is impossible to state what portion, if any, of the amounts set out in the foregoing tabulation were in fulfillment of the aforesaid Treaty of August 7, 1790. It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said treaty."

In addition to the above disbursements under the Treaty of 1790, and in search of further credits against the balance of $98,857.50 due the Creek Nation under the Treaties of 1802 and 1805, the United States also injected into the case certain disbursements, totaling $22,198.00, which the General Accounting Office report stated *it could not identify with any specific Creek treaty.* These disbursements are set forth as follows (R. 122, 127-128, 296):

	1811	1815	1817	1818
Annuity, goods	$3,350.00	$4,300.00		
Annuity, cash				$6,547.00
Claims (depredations)			$2,000.00	5,801.00
Cash payments to Chiefs	200.00			

The United States, nevertheless claimed these disbursements as credits against the balances shown in the General Accounting Office report to be due the Creek Nation under the Treaties of 1802 and 1805, *without identifying them with these treaties* (R. 122, 296).

The United States contended before the Commission that because the petitioner did not show that any of the total amount of the credits claimed by the Government (the $77,263.45 of the unallocated expenditures set forth by the General Accounting Office Report as possible disbursements under the Treaty of 1790 not in issue, and the $22,198.00 unidentified disbursements), or $99,461.45, was *not* paid in satisfaction of the obligations of the United States under Treaties of 1802 and 1805, the Government was entitled to credit the entire amount against its obligations under those treaties. The $99,461.45 exceeded the $98,857.50 claimed by petitioner to be the balance due under the Treaties of 1802 and 1805, so as to defeat petitioner's recovery under these two treaties (R. 296).

The Indian Claims Commission adopted the Government's position and determined that nothing was due to petitioner under the Treaties of 1802 and 1805 (R. 267-

268, 296). In doing so the Commission found that the Creek Nation was a tribe of American Indians within the meaning of the Indian Claims Commission Act, and was authorized to bring this cause of action under Section 2 of said Act; that the claim was in the nature of an action of debt, asking payment for sums allegedly owing and unpaid and obligations unfulfilled, and due petitioner under the treaties in question; and that the relation of guardian and ward as between the plaintiff and the defendant had not been established by competent or relevant evidence (R. 264-265). The Commission further applied the whole amount of $77,263.45 as possible disbursements under the Treaty of 1790 not in issue, without considering the obligations of the United States to the Creek Nation under said Treaty of 1790, and the secret article thereof, and also the $22,198.00 which the General Accounting Office could not identify with any specific Creek treaty, against the balance due under the Treaties of 1802 and 1805, and found and held that petitioner had not proven that any amounts were due the Creek Nation under said treaties (R. 267-269, 273, 277, 283).

Let us point out to the Court that in charging the entire amount of $77,263.45 disbursed for goods purchased at Philadelphia for Creek Indians during the period 1800-1809, against the balance due the Creek Nation under the Treaties of 1802 and 1805, the Commission assumed that these goods were actually received by the Creek Nation. However, the record shows that such shipments were not made directly to the Creek Agency, but were shipped to the United States Factor at Savannah, and held there for transportation overland by wagon to the Creek Agency on the Flint River, when requested by the Indian Agent (R. 215-220, 222). The Government's accounting report shows that only "goods valued at $1,500 and $1,499.02 were actually delivered to the Creek Nation of Indians during the years 1798 and 1799, respectively." (R. 23).

The Commission in doing so relied largely on a decision of the Court of Claims supporting the Government's position in *Chickasaw Nation* v. *United States* (1945), 103 C. Cls. 1, certiorari granted but limited to the question of specific designation of offsets, and judgment reversed, 326 U. S. 217. In relying upon this case rather than upon more recent decisions of the Court of Claims which overrule it, the Commission stated that "The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in Chickasaw] is evidence that it approved the holdings of the Court of Claims in reference to such matters." (7 Ind. Cl. Comm. at 135; R. 278-280). The Commission further stated that the decision of the Court of Claims in Sioux Tribe of Indians v. United States (1946), 105 C. Cls. 725, "could not overrule the same [Chickasaw case] because the Sioux case is a Court of Claims opinion only, while the holdings in the Chickasaw case were approved by the Supreme Court by its refusal to grant a writ of certiorari." (R. 281). We assigned this holding as error because this Court has made it clear in many instances that no such inference is to be drawn from its denial of certiorari in any case (R. 290).

The main issues in this case are thus presented.

Petitioner contended that a fiduciary relationship existed between the United States and the Creek Nation, an Indian tribe, and that the Government had the burden of presenting an accurate accounting of its payments to petitioner pursuant to the treaties in question. Petitioner maintained, therefore, that the Government was not entitled to credit for any amounts not specifically allocated on its books to the fulfillment of these treaties; and that the Government as the fiduciary had the clear burden of proving the credits it claimed against the balances its own accounting showed were due and owing petitioner under said treaties (R. 277-281).

Petitioner further contended that the many decisions of this Court have established that the fiduciary relationship existing between the United States and the Indian tribes is sufficiently similar to the relationship between a guardian and its ward as to impose upon the United States the burden of accounting clearly for the disbursements made in fulfillment of its treaty obligations to an Indian tribe (R. 277-278); that before the respondent was entitled to credit against the amounts claimed by petitioner under the Treaties of 1802 and 1805, it must prove affirmatively that the credits claimed were payments in fulfillment of the 1802 and 1805 Treaties, and were not disbursements under the earlier Treaty of 1790, and the secret article thereof.

Claim Under Article XIII, Treaty of March 24, 1832

Article XIII of the Treaty of March 24, 1832, between the United States and the Creek Nation, proclaimed April 4, 1832 (7 Stat. 366, 2 Kapp. 341), provided in part as follows:

> "• • • Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children.• • • "

Article XV of said treaty further provided:

> "This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States."

This treaty became obligatory upon the parties on April 4, 1832, when proclaimed (2 Kapp. 341; R. 269).

The parties agreed that the total obligation of the United States to the Creek Nation under said Article XIII, was $60,000.00 (R. 270).

The Report of the General Accounting Office shows that the United States disbursed $49,938.99 only in fulfillment of this treaty obligation to the Creek Nation under said Article XIII, as set forth below (R. 59-65):

Education:			
Support of Creek Children at Choctaw Academy	1832-1836, 1838	$10,934.48	
	1837-1843, 1845, 1849-1850	16,683.12	$27,617.60
Pay of superintendents and teachers	1842-1846, 1848, 1850-1851		2,593.37
Furniture and equipment	1842, 1846, 1850-1851		580.34
Pay of miscellaneous employees	1846-1848, 1850-1851		464.40
Provisions	1846, 1850-1851		2,511.15
Board and tuition	1846-1848, 1850-1851		7,998.48
Medical attention	1846-1848, 1850		105.12
Support of schools	1846-1847		3.40
Transportation of pupils	1848		365.00
Clothing	1850-1851		797.68
Transportation of supplies	1850-1851		1,081.93
Erection and repair of school buildings	1850-1851		4,336.71
Livestock	1850-1851		541.50
School farm	1850-1851		908.07
Fuel and light	1851		19.24
Feed and care of livestock	1851		15.00
	Total disbursements		$49,938.99

The United States failed to account to the Creek Nation for the balance due under said treaty obligation in the amount of $10,061.01, which petitioner claimed as being due and owing to it from the United States under this treaty obligation.

Although petitioner asserted a claim under Article XIII of the Treaty of March 24, 1832 only (R. 4), and issue was joined on this treaty obligation (R. 8), yet, at the request of respondent the Commission injected into its Finding 6 facts relating to an obligation of the United States incurred under Article 4 of the Treaty of January 4, 1845, between the Creek Nation and the United States (9 Stat. 821; 2 Kapp. 550), not a part of peti-

tioner's claim, and not material to it (R. 270, 275). We assigned this action of the Commission as error (R. 286-287).

The respondent admitted that its total obligation under this 1832 Treaty provision was $60,000.00, as the Commission found (R. 270), and the Commission further found that the disbursements under Article XIII of the Treaty of 1832, which began in 1832 and ended in 1851, totaled $49,938.99, as shown by the General Accounting Office Report (R. 59-64). However, the Commission simply made the following finding with respect to petitioner's claim under the 1832 Treaty (R. 270):

> "The plaintiff approves fulfillment by the defendant of the obligations of the Treaty of 1832 in the amount of $49,938.99 as itemized in its Requested Finding 6 and contends that there is a balance due from said obligation in the amount of $10,061.01. This credit in the amount of $49,938.99 is for disbursements up to and including the year 1851 only; however, there were disbursements for the period 1852 to 1861 in the amount of $60,673.23 (Dft's. Ex. 185, 186) in fulfillment of the treaties of 1832 and 1845 that defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845."

The Commission thus completely failed to find whether or not the obligation of the United States under Article XIII of the Treaty of 1832 had been fulfilled. Petitioner assigned this failure as error (R. 286), because this was an essential fact necessary to the proper disposition of the claim asserted by petitioner; and that a finding merely stating the contentions of the parties, without finding which of the contentions was correct, was a failure on the part of the Commission to make an essential and material finding, and was error (Seminole Nation v. United States (1942), 316 U. S. 286, 300; Seminole Nation v. United States, (1942) 316 U.S. 310, 315-316; Snake or Piute Indians v. United States (1953), 125 C. Cls. 241, 255).

Claim Under Treaty of 1833

Article V of the Treaty of February 14, 1833, between the United States and the Creek Nation, proclaimed April 12, 1834 (7 Stat. 417; 2 Kapp. 388), provided in part as follows:

> "As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: • • •"

Article IX of said treaty provided:

> "This agreement shall be binding and obligatory upon the contracting parties, as soon as the same shall be ratified and confirmed by the President and Senate of the United States."

This treaty became binding upon the parties on April 12, 1834, when proclaimed (2 Kapp. 388; R. 271).

The amount to be disbursed annually for education was definitely fixed in the treaty at $1,000.00, but the amount to be disbursed annually for blacksmiths, etc. was not definitely fixed in the treaty. However, Congress made annual appropriations definitely fixing the amount of this treaty provision for blacksmiths, etc. at $1,710.00 over a

long period of time (R. 135-136). The General Accounting Office Report shows that payments under these treaty obligations began in the year 1834 (R. 75). So the date of beginning of these treaty obligations is definitely fixed by the action of the United States. Specific annual appropriations to fulfill these treaty obligations, from 1837 to 1878, were made by Congress, generally in the amount of $2,710.00—$1,710.00 for blacksmiths, etc., and $1,000 for education (Act of July 7, 1838, c.clxxxvi, 5 Stat. 299; R. 135-136). The Act of June 17, 1844 c.cviii, 5 Stat. 704, 706, provided:

> "For blacksmith and assistant, and use of shop and tools, during the pleasure of the President, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, eight hundred and forty dollars:
>
> "For iron and steel, two hundred and seventy dollars;
>
> "For wagonmaker, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, six hundred dollars;
>
> • • • •
>
> "For education, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, one thousand dollars;"

And Article V of the Creek Treaty of August 7, 1856 (11 Stat. 699; 2 Kapp. 756), continued these 1833 treaty obligations in the definite amount of $2,710.00 annually, in the following language:

> "• • • one thousand dollars per annum during the pleasure of the President for the same object [education], under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagonmaker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; • • •"

The General Accounting Office report shows that the United States continued this annual treaty obligation through the year 1878 (R. 136). So the respondent's own records show that the payments on the 1833 Creek treaty obligations began in 1834 and continued through the fiscal year 1878 (R. 75-88). The United States thus acknowledged its obligation to the Creek Nation under this treaty provision in the amount of $2,710.00 annually, or $1,710.00 for blacksmiths, etc., and $1,000 for education, over the period from 1834 through 1878, or for a period of 45 years, less the Civil War period of six years (fiscal years 1862 through 1867), leaving a net obligation of the United States to pay said annuity to the Creek Nation over a period of 39 years at $2,710.00 per annum, or a total obligation of $105,690.00.

The report of respondent's own General Accounting Office shows that $76,285.45 only was disbursed by the United States to the Creek Nation to fulfill the obligation of the United States under this treaty provision, as set forth below (R. 73):

Pay of blacksmith	1834, 1836, 1844-1846	$ 2,234.32
Pay of striker	1834-1836, 1844-1845	911.72
Pay of blacksmith and striker	1838-1841, 1843, 1845-1860	17,890.71
Iron, etc., for blacksmith shops	1835-1839, 1841, 1843-1845, 1847-1849, 1851-1853, 1855-1860	7,266.53
Pay of wagonmaker	1834-1837, 1839-1843, 1857, 1859-1860	4,702.33
Material for mechanical shop	1836	6.00
Erection of shops	1839	2,000.00
Cash payments to Creek Treasurer	1861, 1868-1875, 1877-1878	20,460.00
Education:		
Pay of superintendents and teachers	1837-1841, 1843-1846 1850, 1853	7,278.41
Support of Creek children at Choctaw Academy	1844-1845	1,658.69
Furniture and Equipment	1840-1841, 1846, 1850	162.28

Pay of miscellaneous employees	1850, 1853	237.56
Medical attention	1850	9.24
Provisions	1850	302.13
Clothing	1850, 1853	801.68
Erection and repair of school buildings	1844, 1850, 1853, 1868	2,059.26
Board and tuition	1851-1852, 1855-1860	8,171.31
Transportation of supplies	1853	5.36
Fuel and light	1853	12.60
Traveling expenses of school officials, etc.	1844-1853	81.75
Manual training supplies	1853	33.57
	Total disbursements	$76,285.45

The United States failed to account to the Creek Nation for the balance thus shown by its own accounting to be due under said treaty obligation in the amount of $29,404.55, which petitioner claimed as being due and owing from the United States to the Creek Nation (R. 270-271).

The Commission made the following findings relative to petitioner's claim (R. 271-272):

> "Petitioner contends that the obligation of the United States under said treaty was for a period of 39 years (omitting the Civil War years) at $2,710.00 per annum or a total obligation of $105,690.00; and that the report of the General Accounting Office showed expenditures in fulfillment of said treaty obligation by the United States in the amount of $80,981.45 (items appearing in its Req. Find. No. 7) and that there is a balance due under said treaty obligation of $24,708.55 (Pltf. in its reply brief claims a credit of $4,696.00 was erroneously given defendant and that the balance due is $29,404.55, Reply Brief pp. 32, 33).
>
> "There is no proof in the record as to any pecuniary loss suffered by the petitioner, nor as to the need of services of blacksmiths or other equipment which the treaty obligated the defendant to provide, nor is there any evidence of any demand having been made by petitioner for services or equipment not supplied."

Petitioner on appeal assigned this portion of the Commission's Finding 7 as error (R. 287). The petitioner contended on appeal that the finding in the first paragraph above quoted is wholly incomplete, and therein the Commission failed to find the essential fact—whether or not the total obligation of the United States to the Creek Nation under Article V of the Creek Treaty of February 14, 1833 (7 Stat. 417, 2 Kapp. 388), had been fulfilled; that such a finding, which the Commission failed to make, is essential to the final disposition of this claim; and that a mere finding of what the petitioner contended, without a further finding of whether petitioner's contention was right or wrong meant nothing to the ultimate decision of the case.

Petitioner further contended that it was unnecessary for the ward to prove a demand upon its guardian, the United States, for the service and equipment not supplied, before it was entitled to recover the amount shown by the Government's own accounting report to be due and owing to petitioner under the above treaty obligation of the United States; and that the United States was obligated to fulfill its treaty obligation without a demand from its ward that it do so.

Claim Under the Treaty of 1856

Article VI of the Treaty of August 7, 1856, between the United States and the Creek Nation ratified August 16, 1856 and proclaimed August 28, 1856 (11 Stat. 699, 2 Kapp. 756), provided in part as follows:

> "In consideration of the foregoing quit-claim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe

> stocks, paying an interest of at least five per cent per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * * *"

Article XXVI of this treaty provided in part:

> "This convention * * * shall take effect and be obligatory on the contracting parties from the date hereof, whenever it shall be ratified by the Senate and President of the United States."

This treaty thus became effective on August 7, 1856, when proclaimed by the President on August 28, 1856 (2 Kapp. 756).

The Government's accounting report shows that although Congress annually appropriated the $10,000.00 interest due on said $200,000 fund from the fiscal years 1857 through 1861, both inclusive, or for five years, a total of $50,000.00, yet the United States disbursed $21,000.00 only during said period under this treaty obligation (R. 103, 137). This accounting report thus shows that the United States failed to account to petitioner for the balance due under said treaty obligation in the amount of $29,000.00, which petitioner claimed as due and owing to it from the United States.

In its Finding 8 the Commission stated (R. 272):

> "Plaintiff claims an obligation of defendant under the above provision to pay $10,000 as interest to the plaintiff for the years 1857 to 1861, both inclusive—a total of $50,000 upon which obligation the plaintiff contends the defendant still owes $29,000. (Pet. Req. Finding No. 8)."

On appeal petitioner assigned this part of said finding as error in that the Commission failed to find whether or not the United States had fulfilled its treaty obligation to the Creek Nation in the amount claimed by petitioner; and instead merely recited the petitioner's claim, without finding whether or not petitioner's claim for $29,000.00 was right or wrong. (R. 287-288).

Petitioner further assigned as error that part of Finding 8 which stated (R. 272):

> "The Confederate States paid the $29,000 and plaintiff accepted the same. (Dft's Ex. 160, p. 232; Dft's Ex. 166-170, 173).
>
> "The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790)."

Petitioner on appeal challenged the above findings on the ground that they were immaterial and not supported by substantial evidence (R. 287-288); and contended that there was no evidence in the record showing that the $29,000 claimed was ever paid to the Creek Nation either by the Confederate States of America, or by the United States for the relief of refugee Indians in Kansas during the Civil War; that the record showed that this amount was due and owing by the United States to the Creek Nation under this treaty obligation before the Civil War began; and that the United States had simply failed to pay it regularly and faithfully for the purposes of education among the Creeks, as provided by the treaty.

The petitioner further contended that soon after the beginning of the Civil War the Creek Nation became divided in its sympathies, and formed two independent parties, and that from one-half to three-fourths of the Creeks fled to Kansas where they remained as refugees during the entire period of the War; and that any payment made by the Confederate States to the southern portion of the Creek Nation would not be payment to the Creek Nation, and would not satisfy the obligation of the United States to the Creek Nation, under said Treaty of 1856. And further, that the record did not show that said $29,000 was actually diverted and paid for the relief of refugee Indians in Kansas, and released by the provi-

sions of Article XI of the Treaty of June 14, 1866 (14 Stat. 785, 2 Kapp. 931; Appendix p. 44).

Petitioner further challenged on appeal the following ultimate finding of the Commission, as not being supported by the substantial evidence in the record (R. 273, 288):

> "There is not suff. evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged."

Petitioner had contended that the admissions in the Government's own accounting report showing that the balances claimed were due the Creek Nation under the treaties in question, were sufficient proof of the validity of the claims herein presented; and that the burden was upon the respondent to prove any credits it claimed against the balances shown by its accounting to be due and owing to petitioner under said treaties.

From the findings and holdings of the Commission dismissing the several claims set forth in petitioner's petition, the Creek Nation appealed to the Court of Claims under Section 20(b) of the Indian Claims Commission Act (R. 284-291). After full argument, the majority of the Court of Claims (3 Judges concurring), on March 1, 1961, merely by a per curiam statement, affirmed the findings and holdings of the Commission, without analyzing and reviewing the issues raised on appeal (R. 292).

Judge Littleton, the Senior Judge of the Court (now retired), who was joined by Judge Madden, wrote a dissenting opinion, the only opinion of the Court of Claims in this case, analyzing the findings and holdings of the Commission, and pointing out the errors of fact and law made by the Commission, and upholding the claims of petitioner in the instances set forth in the dissenting opinion (R. 292-315).

The dissenting opinion pointed out (R. 292-294):

> "This appeal, which the majority has disposed of summarily in a per curiam statement which merely affirms the determination of the Commission, concerns an entirely novel question which has been raised for the first time under the Indian Claims Commission Act and goes to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Commission. While the instant suit was not brought strictly as a suit for an accounting, it is very similar in nature to the accounting suits now pending before the Commission, and it will inevitably serve as a general guide to their disposition. In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions. In the *Iowa Tribe of the Iowa Reservations in Kansas and Nebraska, et cetera* case, Docket No. 70, decided June 19, 1952, 2 Ind. Cl. Comm. 167, 176, the Commission stated that:
>
> > 'In its dealings with the Tribe the defendant kept the only records of these transactions as a self-imposed duty to its illiterate and incompetent wards and thereby became accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations.'
>
> The Commission has erroneously placed great reliance on the mistaken view that denial of certiorari by the Supreme Court constitutes approval of the decision of the case wherein certiorari is denied. Moreover, I am of the opinion the Commission has not followed

the principles of the decided cases nor the rules of this court with respect to burden of proof where the Government sets up and relies on the affirmative defense of payment (Rule 15(b) of the Rules of the Court of Claims). Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligation which, until this time, the court has conscientiously fulfilled. The appeal by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not disregarded or overlooked the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's function in claims appealed from the Indian Claims Commission to be like that of the Circuit Courts of Appeals in appeals from the District Courts. 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. • • •

• • • •

In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail."

The dissenting opinion then reviewed the decisions of this Court and those of the Court of Claims holding that a fiduciary relationship does exist between an Indian tribe and the United States; that this relationship is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of accounting clearly for amounts disbursed in fulfillment of its Indian treaties; that the relationship is not one of debtor-creditor, or of parties on an equal footing dealing at arms' length with one another; that the United States has the burden of proving affirmatively the credits

its claims against the balances shown by its own accounting to be due the Indian tribe; and that the denial of a writ of certiorari by this Court has no bearing on the merits of the claim presented in the petition for a writ of certiorari.

The dissenting opinion then analyzes the issues relating to the claims of petitioner under the several treaties in question, applying the law thereto in the light of the decisions reviewed.

With respect to the petitioner's claim for the unpaid balance of $98,857.50 under the Treaties of 1802 and 1805, the dissenting opinion pointed out that some of the unallocated amount of $99,461.45, which was credited against the $98,857.50 claimed, could be attributed to disbursements under the Treaty of 1790, for it is clear from the face of that treaty that there was an obligation of the United States of at least $1,500.00 a year due petitioner; that for the years 1790 through 1797, and 1800 through 1809, a total of 18 years, the Government's records do not specifically show payment of this $1,500 annuity, and that at least $27,000 of the payments made from 1803 to 1818 were made in fulfillment of the 1790 treaty obligation; and, therefore, at most $72,461.45 of the unallocated amount of $99,461.45, could properly be credited to the Government as fulfillment of its obligations under the Treaties of 1802 and 1805, leaving $26,396.05 which is not shown to have been paid under the 1802 and 1805 treaty balances (R. 306-308). The dissenting opinion then states (R. 307):

> "In addition, I think that appellant should be permitted, upon a remand to the Indian Claims Commission, to show any other obligations of the United States, in addition to the $1,500 under the 1790 Treaty, for which the payments shown for 1803 through 1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which I find to be the maximum allow-

able to the Government against its 1802 and 1805 treaty obligations, given the state of its records."

The dissent did not take into consideration the further amounts paid by the United States under the secret article of the Treaty of 1790, which petitioner also believes should have been considered.

With respect to the balance of $10,061.01 claimed to be due petitioner under Article XIII of the Treaty of March 24, 1832, the dissenting opinion pointed out that the Indian Claims Commission did not find any additional credits due the Government on this obligation, and that the Commission failed to make any finding as to whether or not the Government's obligation under the 1832 Treaty was fulfilled (R. 308); and further stated (R. 308):

> "I think that the Commission's failure to find whether the 1832 Treaty obligation was fulfilled requires us to remand this portion of the case to the Commission for such a finding. On its fact, the Commission's 'finding' is merely a restatement of the Government's contention, and not a finding at all.
>
> "The Commission's 'ultimate' finding that there was not sufficient evidence in the record to show that any of the indebtedness claimed by appellant had not been discharged does not remedy its failure to make a material finding of fact. Where required findings are not made by the Commission, the court will set aside the Commission's final determination and remand the case so that such findings may be made. Snake or Piute Indians v. United States, 125 Ct. Cl. 241, 255."

With respect to the balance of $29,404.55 claimed to be due petitioner under Article V of the Treaty of 1833 the dissenting opinion pointed out that the United States did not claim credit for more than the $76,285.45 which its records show it had paid on this treaty obligation ($2,710 per year for 39 years, or a total of $105,690.00), but took the position that the size of the obligation under the 1833

treaty was not adequately established; and further stated (R. 309-310):

> "The Indian Claims Commission concluded that it was unnecessary for it to determine whether the basis for establishing the treaty liability as contended for by appellant was correct, in view of its holding that appellant had 'not proven the alleged failures of the appellee to fulfill its obligations * * *'. 7 Ind. Cl. Comm., 138. Since I would conclude that appellant has laid sufficient basis for a conclusion that appellee failed to fulfill its obligations, I think that it was necessary for the Indian Claims Commission to determine the amount of the Government's obligation under the 1833 Treaty. I would therefore remand this portion of the case to the Commission for such determination."

With respect to the balance of $29,000 admittedly due petitioner as interest at 5 per cent per annum on the $200,000 trust fund, during the period of the fiscal years 1857 through 1861, which the Treaty of 1856 required the United States to apply annually for education of the Creeks, the Government before the Commission and Court of Claims had contended (1) that under Article XLI of its Treaty of 1861 with the Creek Nation the Confederate States agreed to pay the $29,000.00 and did so on or about January 28, 1862, and that such payment discharged the obligation of the United States to the Creek Nation in this amount; and (2) that under the Civil War Resolution of February 22, 1862, 12 Stat. 614, authorizing the use of Creek annuities which had not been disbursed, for the benefit of refugee Indians in Kansas, that the $29,000 in question was so used, and that this diversion of annuities was ratified and confirmed by petitioner by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790; 2 Kapp. 931.

The dissenting opinion of Judge Littleton reviewed the record, and answered the first contention of the Government pointing out that there was no evidence in the record

to show that this balance was paid to the Creek Nation as such (R. 311, 313); that the evidence showed that soon after the Civil War began the Creek Nation was about evenly divided in its sympathies, and divided into two independent and opposite factions—those in sympathy with the North, and those in sympathy with the South; that the Northern faction, under the leadership of Chief Opoeth-le-yo-ho-la, met in convention on August 5, 1861 in the Creek Nation, and declared that the Creek chiefs who had signed a treaty with the Confederate States had done so without action of the Creek Council, the governing body of the Creek Nation, and had thus forfeited their administrative rank; that the Union-minded Creeks, estimated to number 6,000, or from one-half to three-fourths of the Creeks, fought several battles with the Confederate forces composed partly of the Southern Creeks, along the shores of the Arkansas and Verdegris Rivers throughout November and December of 1861, and had withdrawn farther north toward the southern border of Kansas, and were then treating with United States agents for relief for their refugees, and arranging for rendering military assistance by the Creeks to the United States (R. 139-151, 157, 161-185); that in view of the fact that the Creek Nation thus became divided into two independent entities it cannot be said that the portion which remained in the South constituted after November 1861, the Creek Nation; and any payment by the Confederate States near Little Rock, Arkansas, after January 28, 1862, to the Southern portion encamped there "cannot be said to have been payment of the obligation which was owed to the Creek Nation". (R. 310-313).

Judge Littleton analyzed the Government's second claim of credit for the payment of $29,000.00 (R. 313-315), and pointed out that there was no substantial evidence in the record of this case to support a finding that *"the $29,000 in issue* was in fact paid to refugee Indians"; that the Commission did not so find, but found only "that the

United States Congress had approved such payment for the benefit of refugee Indians, 'which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).'"; that the Treaty of 1866 approved and confirmed only "*expenditures made*" by the United States for that purpose; and that there was no evidence to show that this particular $29,000.00 was ever so disbursed. The dissenting opinion then concluded (R. 314):

> "Unless, upon remand to the Indian Claims Commission, appellee could show that the $29,000 due under the 1856 Treaty was among the sums disbursed in 1862-1867, either by pointing to an explicit accounting for that obligation, or by showing that the total of the treaty obligations payable to the Creeks was not greater than the amount of 1862-1867 expenditures in excess of current obligations, or otherwise, I think that appellant is entitled to recover the $29,000."

SUMMARY OF ARGUMENT

1. The holding of the Indian Claims Commission, affirmed by the per curiam statement of the majority of the Court of Claims—that the relationship between the United States and the Indian tribes, in this case the Creek Nation, is that of debtor and creditor, or one in which the parties were dealing as equals and at arms length—is contrary to the many decisions of this Court and of the Court of Claims.

This Court has held in a long line of decisions that a fiduciary relationship exists between the United States and the Indian tribes, and that this relationship resembles that of guardian and ward. *Cherokee Nation* v. *Georgia* (1831), 5 Pet. 1, 16-17; *United States* v. *Kagama* (1886), 118 U.S. 375, 383; *Choctaw Nation* v. *United States* (1886), 119 U.S. 1, 27-28; *United States* v. *Payne* (1924), 264 U.S. 446, 448; *Quick Bear* v. *Leupp* (1908), 210 U.S. 50, 80-81; *United States* v. *Creek Nation* (1935),

295 U. S. 103, 109-110; *Seminole Nation* v. *United States* (1942), 316 U. S. 286, 296-297; *Creek Nation* v. *United States* (1943), 318 U. S. 629, 642.

In *Seminole Nation* v. *United States* (1942), 316 U. S. 286, 296-297, this Court held that in carrying out its treaty obligations with the Indian tribes the United States is "something more than a mere contracting party," and that its dealings with the Indians should therefore be "judged by the most exacting fiduciary standards".

In *United States* v. *Creek Nation* (1935), 295 U. S. 103, 109-110, this Court held that the Creek Nation was under the guardianship of the United States, that it was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests.

In *Quick Bear* v. *Leupp* (1908), 210 U. S. 50, 80-81, this Court held that treaty annuities due an Indian tribe had "exactly the same characteristics" as a "trust fund," and that "they are moneys belonging really to the Indians".

The Court of Claims has held in *Menominee Tribe* v. *United States* (1944), 101 C. Cl. 10, 19-20, that the United States is "a debtor who stands in the position of a trustee or fiduciary toward his creditor", when the creditor is an Indian tribe, and that it would "test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee".

In *United States* v. *Seminole Nation* (1959), 146 C. Cl. 171, 181-182, the Court held that the relationship between the United States and the Indian tribes in general is that of "a fiduciary relationship".

The Indian Claims Commission and the Court of Claims should have taken judicial notice of the decisions of this Court holding that a fiduciary relationship exists between the United States and the Indian tribes, and that this

relationship need not be proven in litigation under the Indian Claims Commission Act, which permits only Indian tribes, bands or other identifiable groups of American Indians to present their claims against the United States for final determination.

Whether a general fiduciary relationship or a technical and formal guardian and ward relationship exists between the parties, the remedies available to the injured party are the same. *Dick* v. *Albers* (1910, 243 Ill. 231), 90 N.E. 683, 684-685; *Memonime Tribe* v. *United States* (1944), 101 C. Cls. 10, 19-20; *Seminole Nation* v. *United States* (1942), 316 U. S. 286, 296-297.

Under the well settled principles governing the fiduciary relationship the United States, as the fiduciary, has the burden of accounting strictly to an Indian tribe for the amounts disbursed by it in the fulfillment of its treaty obligations to the tribe. *Dillman* v. *Hastings* (1892), 144 U. S. 136, 140-142; *Villa Site Co.* v. *Copeland* (1920, N. J. Eq.), 111 A. 39, 43; *Ingram* v. *Lewis* (1930, C.C.A. 10), 37 F.2d 259, 260; *Akin* v. *Warner* (1945, Mass.), 63 N.E.2d 566, 569-570; *Garrett* v. *First Nat. Bank & Trust Co. of Vicksburg, Miss.* (1946, C.C.A. 5), 153 F.2d 289, 292; *Sioux Tribe* v. *United States* (1946), 105 C. Cl. 725, 802; *Bogert, Trusts and Trustees* (1948 Ed.), Vol. 4, Pt. 2, Sec. 963, p. 243; *Scott on Trusts (2nd Ed.)*, Sec. 172, pp. 1287-1288.

2. The burden of proof of petitioner with respect to the claims herein presented was satisfied when the Creek Nation proved the total amount of the treaty obligations due it from the United States, and that the admissions in the Government's own accounting showed that it had not disbursed the full amounts due under said treaty obligations, and that the balances claimed by petitioner were due and owing to it. Bogert on Trusts and Trustees, (1948 Ed.) Vol. 4, Sec. 969, pp. 297, 299; *McComb* v. *Frink* (1893), 149 U.S. 629, 644; *In re Tretheway's Estate* (1939, Cal.), 89 P.2d 679, 682; *Florida Fruit Canners* v. *Walker*

(1937, 5 C.C.A.), 90 F.2d 753, 758; *Harrison* v. *Remington Paper Co.* (1905), 140 F. 385, 402.

3. The United States as the fiduciary has the burden of proving the credits it claims on the unpaid balances shown to be due petitioner, the United States alone having kept the records of these transactions; and if the accounts are not clearly kept, or the records are lost or missing, all presumptions are resolved against the fiduciary, and it must stand the resulting loss. *Smith* v. *Robinson* (1914, 83 N.J. Eq. 384), 90 A. 1063, 1065; *Bennett* v. *Weber* (1926, 323 Ill. 283), 154 N. E. 105, 110; *Talbot* v. *Automobile Identification Underwriters, Inc.* (1931, Tenn.) 43 S.W.2d 220, 221; *Smith* v. *Tolversen* (1934 Minn.) 252 N. W. 423, 425; *Benbow* v. *Benbow* (1934, 117 Fla. 37), 157 So. 512, 519; *Florida Fruit Canners* v. *Walker* (1937), 90 F.2d 753, 758; *Sioux Tribe* v. *United States* (1946), 105 C. Cl. 725, 802; *Bogert, Trusts and Trustees* (1948 Ed.), Vol. 4, Pt. 2, Sec. 962, pp. 239-242, 244-245 (footnote), Sec. 971, p. 328; *Restatement of Law of Trusts, Amer. Law Inst.*, Vol. 1, Sec. 172, pp. 445-446; *Pomeroy's Equity Juris.* (4th Ed.), Vol. 2, Sec. 956, pp. 2038-2042.

Wholly apart from the principles governing the fiduciary relationship, it is a general rule of evidence that when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party; and when petitioner's case depends upon the establishment of a negative, as it does here, and the means of proving the facts are within the sole possession of the opposite party, the latter party must produce such proof; and upon his failure to do so, the presumption arises that it does not exist, which of itself establishes a negative. *United States* v. *Denver & R.G.R.R. Co.* (1903), 191 U. S. 82, 92; *Colorado Coal Co.* v. *United States* (1887), 123 U. S. 307, 318-320; *Rossi* v. *United States* (1933), 289 U. S. 89, 91-92. This rule has been held to

apply to accounting cases. *Cliett* v. *Scott* (C.C.A. 5th. 1939), 102 F.2d 725; *Merriam* v. *Venida Blouse Corporation* (S.D.N.Y., 1938), 23 F. Supp. 659, 660-661; *United States* v. *Bull Steamship Line*, (S.D.N.Y., 1956), 146 F. Supp. 210, 213.

Furthermore, the United States has the burden of proving the credits it asserts as payments made by the United States on the claims of petitioner, under Section 2 of the Indian Claims Commission Act. *Menominee Tribe* v. *United States* (1951), 118 C. Cls. 290, 326; *Kiowa, Comanche and Apache Tribes*, 5 Ind. Cl. Comm. 297, affirmed *United States* v. *Kiowa, Comanche and Apache Tribes* (1958), 143 C.Cls. 534, 543.

4. The failure of the Indian Claims Commission to make essential findings of fact necessary to the proper disposition of the claims asserted by petitioner under the 1802, 1805, 1832, 1833, and 1856 Treaties in question, and also the payments made under the 1790 Treaty and the secret article thereof, and making findings not supported by the substantial evidence in the record, are reversible errors. *Seminole Nation* v. *United States* (1942), 316 U. S. 310, 316; *Snake or Piute Indians* v. *United States* (1953), 125 C. Cls. 241, 255.

The failure of the Court of Claims to review the record when the findings of fact of the Commission are challenged upon appeal as not being supported by substantial evidence, falls far short of its duty as an appellate court under the provisions of Section 20(b) of the Indian Claims Commission Act.

When a nation is divided into two independent factions, who consider each other as enemies, and acknowledge no common judge, the nation is dissolved, and neither one represents the nation, and the party in amity with the United States cannot be held responsible for the acts of the other adversary party. *Vattel*, Book III, Ch. XVIII,

pars. 292, 293, Chitty Ed., pp. 424, 427; *Conners* v. *United States* (1898), 33 C. Cls. 317, 325, affirmed *Conners* v. *United States* (1901), 180 U. S. 271, 275-276; *Montoya* v. *United States* (1897), 32 C. Cls. 349, 361-362, affirmed *Montoya* v. *United States* (1901), 180 U. S. 261, 268. The majority of the Creek Nation as an ally of the United States during the Civil War cannot be held responsible for the action of that part of the Creek Nation that joined with the South, and waged war against the United States and the majority of the Creek Nation.

The Creek Nation being thus divided into two independent parties, payment of annuities by the Southern Confederacy to that portion of the Creek Nation that joined the South, would not discharge the obligation of the United States to pay the balance of $29,000 due the Creek Nation under Article VI of the Treaty of August 7, 1856, 11 Stat. 699, here in issue.

The ratification by the Creek Nation of the diversion of Creek annuities for the relief of refugee Indians during the Civil War period in Article XI of the Treaty of June 14, 1866, 14 Stat. 785, applied to amounts actually paid for such purpose, and would not apply to any Creek annuities that had not been proven by the respondent to have been paid for that purpose.

5. The denial of a writ of certiorari by this Court does not constitute an affirmance of the decision of the lower tribunal. *United States* v. *Shubert* (1955), 348 U. S. 222, 228-229; *Sunal* v. *Large* (1947), 332 U. S. 174, 181; *House* v. *Mayo* (1945), 324 U.S. 42, 48; *Atlantic Coast Line R. Co.* v. *Powe* (1931), 283 U. S. 401, 403-404; *United States* v. *Carver* (1923), 260 U. S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.* (1916), 240 U.S. 251, 258; *Darr* v. *Burford* (1950), 339 U. S. 200, 226-228.

ARGUMENT

The majority of the Court of Claims merely affirmed the findings and opinion of the Indian Claims Commission by a per curiam statement, and wrote no opinion analyzing the issues raised upon appeal to that Court. So we must review the dissenting opinion of Judge Littleton (Senior Judge now retired), joined in by Judge Madden (now also retired) which carefully, and we believe correctly, analyzed the issues raised upon the appeal in this case.

1.

A Fidcuiary Relationship Exists Between the United States and the Indian Tribes, Requiring the United States to Account Strictly to the Indian Tribes for the Disbursements Made by It in Fulfillment of Its Treaty Obligations With Them

It is well settled by the many decisions of this Court and the Court of Claims that a fiduciary relationship does in fact exist between the United States and the Indian tribes, the Creek Nation in this case, and that this relationship resembles that of guardian and ward.

The dissenting opinion of Judge Littleton clearly reviews the settled law on this issue as follows (R. 297-301):

> "I think that the decisions of the Supreme Court of the United States, and the prior decisions of this court, establish that the relationship between the United States and an Indian tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties.
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> • • • •
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> "The Supreme Court has on numerous occasions made clear that the duties owed by the Government of the United States to the Indian tribes with which it deals are of the most exacting nature, to 'be judged

by the most exacting fiduciary standards.' *Seminole Nation* v. *United States*, 316 U. S. 286, 297. The basis for the high obligations owed by the Government was established as early as 1831, in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16-17, where the Court, speaking through Chief Justice Marshall, stated:

> [The Indians] are in a state of pupilage. Their relation to the United States *resembles that of a ward to his guardian.**

"With respect to the relationship between the Creek Nation and the United States, the Supreme Court has said, in *Creek Nation* v. *United States*, 295 U. S. 103, 109-110:

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* In Cherokee Nation v. Georgia, supra, this Court stated the reasons for its conclusion as follows:

> "* * * The condition of the Indians in relation to the United States is unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.
>
> "* * * They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing their affairs as they think proper; * * *
>
> "* * * They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. * * *"

The Creek Nation, like the Cherokee Nation, acknowledged itself "to be under the protection of the United States of America" in Article II of the Treaty of August 7, 1790, 7 Stat. 35, the first treaty between the Creek Nation and the United States (supra, pp. 11-12).

> • • • the tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government.
>
> • • • It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests.

"The Indian Claims Commission itself has recognized that a 'fiduciary relationship' exists between the Creek Nation and the United States. *The Creek Nation* v. *United States*, 2 Ind. Cl. Comm. 66, 114.

"The Supreme Court further defined and established the nature of the relationship between the Government and the Indian tribes as similar to that of guardian and ward in *United States* v. *Kagama*, 118 U. S. 375, where the Court said, 'These Indian tribes *are* the wards of the Nation.' 118 U. S. at 383.

"Appellee places great reliance upon an 1886 decision of this court, *Choctaw Nation* v. *United States*, 21 Ct. Cl. 59, where it was said that the cases 'fall far short of holding that the rules of law as applicable to controversies between guardian and ward are to prevail in suits between the United States and the Indian tribes.' 21 Ct. Cl. at 92-93. Appellee has overlooked the fact that the decision was reversed by the Supreme Court, in *Choctaw Nation* v. *United States*, 119 U. S. 1, and that the Supreme Court said:

> As was said by this court recently in the case of the *United States* v. *Kagama*, 118 U. S. 375, 383: 'These Indian Tribes *are* the wards of the Nation; they are communities dependent on the United States; • • •'
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> • • • • •
>
> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their

> own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws. 119 U. S. at 27-28.

"The Court repeated, in *United States* v. *Payne*, 264 U. S. 446, that, with regard to the Indians,

> • • • the United States occupies the position and assumes the responsibilities of virtual guardianship, • • •. 264 U. S. at 448.

"Of particular importance is the Supreme Court's ruling in *Seminole Nation* v. *United States*, 316 U. S. 286, which involved the question of the handling of annuity payments to Indians. It is true that the treaty had set up a 'trust fund' out of the interest from which the annuities were to be paid. But the Supreme Court did not base its conclusion upon the 'trust nature' of the particular fund involved. The Court stated:

> "'• • • this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. [Citations omitted.] In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most

exacting fiduciary standards. 316 U.S. at 296-297.'

"The Court made clear that the Government's fiduciary responsibilities derive from the *status* of the 'dependent and sometimes exploited' Indians, and that the Government bears these responsibilities 'in its dealings' with the Indians, not, as defendant would have it, merely in connection with those particular dealings which, when occurring between two equal parties, would give rise to fiduciary duties.

• • • •

"The Government strenuously urges that the fact that appellant and the Government stand in a creditor-debtor relation precludes the conclusion that it owes appellant the duties of a trustee. The Government's contention is expressly negatived by the language of this court in *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 20, where the court stated that the Government is 'a debtor who stands in the position of a trustee or fiduciary toward his creditor,' when the creditor is an Indian tribe. The Supreme Court, in *Quick Bear* v. *Leupp*, 210 U. S. 50, 80, said that the amounts there in question, a 'Treaty Fund' of annual appropriations for payment of treaty stipulations, i. e., for payment of a *debt* to the Indians, had 'exactly the same characteristics' as a 'Trust Fund' applied to the education of the Indians. The Court said, 'They are moneys belonging really to the Indians.' 210 U. S. at 81. That case clearly shows that the treatment of payments of a debt may be governed by fiduciary obligations when the debt is one owed by the United States to an Indian tribe. As the Supreme Court said in *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 297, 'In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party.'"

The dissenting opinion, in footnote 5, further pointed out that (R. 302):

"The Government, in its brief in this case, acknowledges that the 'treaty stipulations made the basis of

claim herein, and the allegations of the petition respecting them fall into' the category which the Supreme Court in *Quick Bear* v. *Leupp* described as 'the Indians' money'."

The dissenting opinion continues (R. 302):

"This court has recognized that it is 'settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee.' *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19. In that case, the Government was merely a debtor, yet the court held that it would 'test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee.' 101 C. Cl. at 19. The duty there imposed on the Government was that of seeing to it that the Indians' property—claims against the Government—was productive of an income. This is certainly more than the duty of an ordinary debtor, and no less rigorous than the duty of keeping a clear account of the Indians' claims. The court characterized the Government's position as that of 'debtor-with-the-duties-of-a-trustee', 101 Ct. Cl. at 19 (and has recently characterized the Indians as '*quasi wards*', *Chickasaw Nation* v. *United States*, 132 Ct. Cl. 359, 362)."

In footnote 6 Judge Littleton further pointed out (R. 302-303):

"This court's language in *Gila River Pima-Maricopa Indians* v. *United States*, 135 Ct. Cl. 180, 189, relied on by the Government, is not to the contrary. All that was said in that case was that the *precise, formal* guardian-ward relationship between the United States and an Indian tribe is created by treaty or other specific provision, while in the absence of such express provision, the relationship is one which is similar to or resembles the technical guardian-ward relationship, as was held in *Creek Nation* v. *United States*, 318 U. S. 629, 642; *Seminole Nation* v. *United States*, 316 U. S. 286; and *Menominee Tribe of Indians* v. *United States*, 102 Ct. Cl. 555.

"This court's opinion in the recent case of *United States* v. *The Seminole Nation*, Appeal No. 3-58, de-

cided June 3, 1959, —— Ct. Cl. ——, 173 F. Supp. 784, 790, makes clear that all the *Gila River* case said was that while 'preciseness' in the relationship is found in the particular treaty provision, the nature of the relationship between the United States and Indian tribes in general is that of 'a fiduciary relationship'. The court said (173 F. Supp. at 790):

'Whatever the expression or term used, the relationship is one founded upon a distinctive obligation of trust. The obligation owed by the government basically grows out of the dependent status of its Indian "wards".'

"I am also aware of what was said in *Kansas or Kaw Tribe of Indians* v. *United States*, 80 Ct. Cl. 264, 301-302, *cert. denied*, 296 U. S. 577, to the effect that a treaty provision similar to that of Article II of the 1790 Creek Treaty did not create a guardian-ward relationship. That case was decided on December 3, 1934, prior to the Supreme Court's decision in *Creek Nation* v. *United States*, *supra*, announced on April 29, 1935. I think that the *Creek* case vitiates any broad force of this language in the *Kansas* case, which can mean only that *a technical* guardian-ward relationship does not exist. See *United States* v. *Seminole Nation*, *supra*, 173 F. Supp. 784, 790. For the same reason the language in *Omaha Tribe of Nebraska* v. *United States*, 6 Ind. Cl. Comm. 68, 71-74, is of doubtful validity, and is based primarily on the *Kansas* case and a misinterpretation of the *Gila River* case."

The dissenting opinion further stated (R. 303-305):

"I think that the above discussion indicates that the debt owed to an Indian tribe pursuant to a treaty must be 'dealt with by the Government as if it belonged to [the Indians], as morally it does', *Quick Bear* v. *Leupp*, 210 U. S. 50, 80, *supra*, and that the Government is bound by duties of a trustee in dealing with this money. *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19, *supra*. The decision of this court in *Sioux Tribe* v. *United States*, 105 Ct. Cl. 725 (certiorari granted, judgment vacated, and case remanded to Court of Claims for determination as to

whether plaintiff-petitioner could assert any additional claims, 329 U. S. 685; supplemental petition dismissed, 112 Ct. Cl. 50; *cert. denied*, 337 U. S. 908), is, therefore, directly applicable here.

> 'The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802.'

"In the *Sioux* case, the Indians sought to recover certain amounts disbursed by the Government from trust funds which had arisen from the sale of land belonging to the Indians. The disbursements had been made by the Government for certain Indian agency and educational expenses. The Indians claimed that the disbursements were for obligations of the Government, so that they should not have been paid out of the Indians' funds. The Government maintained that the expenditures were proper charges against the Indians' funds since they were expenditures for the benefit of the Indians, and argued that the Indians had the burden of showing what portion of the disbursements were for obligations of the Government. It said that in the voluminous accounting as to the claims presented it could not be expected to detail with exactness the purposes and amounts of the many disbursements, and that the burden rested on the Indians to prove such details. The court held, however, that the 'primary duty to so classify and report as to the nature and the amount of disbursements rested on defendant.' 105 Ct. Cl. at 802.

"The court said:

> 'Since the Government obligated itself in the treaty and the agreements of 1868, 1877, and 1889 to provide agencies, aid and assistance, schools, and instruction, the burden is on defendant to show what portion, if any, of such expenses has not been assumed by it and should be charged to the Indians. *The Government cannot escape its primary obligations by including, among improper charges against the Indians, expenditures which it now says, without proof, may have been to some unknown and unascertainable extent prop-*

er charges against the Indians. The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802.' [Emphasis supplied.]

"The Indian Claims Commission attempted to distinguish the *Sioux* case on the grounds that it involved a 'trust fund' whose handling was 'governed by the rules applying to trustee and guardian,' while the present case 'only involves the relationship of • • • ordinary debtor and creditor.' 7 Ind. Cl. Comm. at 135-136. Since, as has been demonstrated above, an Indian tribe and the Government are not 'ordinary debtor and creditor', and the Government's handling of its debts to the Indians is in fact 'governed by the rules applying to trustee and guardian', the *Sioux* case is very much in point here.

"The relationship between the United States and appellant is not *precisely* that of guardian and ward, but their relationship is sufficiently similar thereto to impose upon the United States the duty of maintaining a clear and unambiguous account of its payments to appellant under its various treaty commitments.

"The conclusion that the United States owes to an Indian tribe the duty of maintaining a clear account is in accord not only with the authoritatively established nature of the relationship between the Government and the Indian tribes, but also with a practical understanding of the problems involved in this particular aspect of the dealings between these parties. Throughout the time during which the treaty payments here in issue were due, the Indians were largely illiterate and unskilled in the ways of the men who had arrived from Europe. Particularly unfamiliar must have been the ways of bookkeeping and accounting. To compare the facilities and capacity for maintaining financial records possessed by the United States Government with those possessed by the Indians, whose life was oriented so differently, is to reveal the reasonableness of the conclusion that the United States is charged with keeping a clear account

of the payments it makes pursuant to its obligations to the Indians."

The cases reviewed in the dissenting opinion of Judge Littleton support the view that a general fiduciary relationship does exist between the Indian tribes and the United States, and that this relationship developed from the great disparity of the parties, the complete dependence of the Indian tribes upon the United States in the dealings between them, and under the provisions of treaties under which these tribes agreed to come under the protection of the United States.

In Words and Phrases (Perm. Ed.), Vol. 8A, p. 103, it is stated:

> "'Confidential relationship' exists when circumstances make it certain that parties do not deal on equal terms, but on one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed and does not exist where parties deal on terms of equality. In re Stroming's Will, 79 A.2d 492, 495, 12 N. J. Super. 217."

Given a general fiduciary relationship, or a technical formal guardian and ward relationship, the remedies applicable to both are the same. In the case of *Dick* v. *Albers* (1910, 243 Ill. 231), 90 N. E. 683, 684-685, the Court states:

> "• • The terms 'fiduciary relation' and 'confidential relation' have frequently been used interchangeably by courts and law writers. In general, the relationship is one in which if a wrong arise the same remedy exists on behalf of the injured party as would exist against a trustee on behalf of the cestui que trust. Central Nat. Bank v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. A person is said to stand in a fiduciary relation to another when he has rights and duties which he is bound to exercise for the benefit of that other person. In such case he is not allowed to derive any profit or advantage from the relation between them, except upon proof of full knowledge and consent of the other person. The relations of attorney and client, principal and agent,

guardian and ward, are familiar illustrations of fiduciary relations. The relation exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. The rule embraces both technical and fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another. The origin of the confidence reposed is immaterial. Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808."

See also *Menominee Tribe* v. *United States* (1944), 101 C.Cls. 10, 19-20.

This Court applied the above principle in *Seminole Nation* v. *United States*, 316 U. S. 286, 296-297, and stated that in carrying out its treaty obligations with the Indian tribes, the Government is *more than a mere contracting party*, and that its dealings with the Indians should "be judged by the most exacting fiduciary standards."

The Commission properly found that the petitioner was an Indian tribe, and that it had authority to present this claim under the Indian Claims Commission Act (R. 264). As this act applies solely to tribes, bands and identifiable groups of American Indians, we submit that the Commission erred in finding that the petitioner must further prove affirmatively that a general fiduciary relationship existed between the Creek Nation and the United States; and suggests that the Commission and the majority of the Court of Claims should have taken judicial notice of the decisions of this Court, and their own decisions, holding that a fiduciary relationship does in fact exist between the Indian tribes and the United States.

Clearly the dissenting opinion of Judge Littleton, concurred in by Judge Madden, correctly reflects the many holdings of this Court that a fiduciary relationship does exist between the Indian tribes and the United States, and that the United States, as the fiduciary, has the bur-

den of making a clear and precise accounting to petitioner for the payments it made under its treaty obligations here brought into question. *Dillman* v. *Hastings* (1892), 144 U. S. 136, 140-142; *Villa Site Co.* v. *Copeland* (1920, 91 N. J. Eq. 503), 111 A. 39, 43, 13 A. L. R. 356; *Ingram* v. *Lewis* (1930, C.C.A. 10), 37 F.2d 259, 260, 70 A.L.R. 702; *Akin* v. *Warner* (1945, Mass.) 63 N.E.2d 566, 569-570; *Garrett* v. *First Nat. Bank & Trust Co. of Vicksburg, Miss.* (1946, C.C.A. 5), 153 F.2d 289, 292; *Sioux Tribe* v. *United States* (1946), 105 C. Cls. 725, 802; *Bogert, Trusts and Trustees* (1948 Ed.), Vol. 4, Pt. 2, Sec. 963, p. 243; *Scott on Trusts* (2nd Ed.) Sec. 172, pp. 1287-1288.

2.

Petitioner Was Entitled to Rely upon the Admissions Contained in the Government's Accounting Report

In 1932 the United States accounted to the Creek Nation for the first time for the manner in which it performed its treaty obligations to that tribe, and filed its accounting report in Case H-510, *Creek Nation* v. *United States*, 78 C. Cls. 474, involving disbursements of Creek funds for the period beginning July 1, 1898 (R. 15-16). This suit was filed under the jurisdictional act of May 24, 1924 c. 181, 43 Stat. 139, as amended by Joint Resolution of May 19, 1926, c. 341, 44 Stat. 568, and by Joint Resolution of February 19, 1929, c. 268, 45 Stat. 1229, limiting the time for filing claims thereunder to June 30, 1930 (R. 16-17). As the accounting report was not filed in that proceeding until August 10, 1932 (R. 15-16), after the date for filing claims had expired, the claims now presented were not litigated in Case H-510, but petitioner was required to wait until the passage of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, to do so.

The admissions in the accounting report of the Government clearly show that the balances herein claimed to be

due the Creek Nation had not been disbursed by the United States in fulfillment of its treaty obligations to the Creek Nation in question. As the dissenting opinion of Judge Littleton, states (R. 295):

> "Appellant introduced in evidence before the Indian Claims Commission the records of treaty payments to appellant which were maintained by the Government and are now in the custody of the General Accounting Office. These records do not specifically show that the entire amounts due under the various treaties in issue were paid to appellant.
>
> "The amounts claimed by appellant are $62,309.75 under the Treaty of 1802, $36,547.75 under the Treaty of 1805, $10,061.01 under the Treaty of 1832, $29,404.55 under the Treaty of 1833, and $29,000 under the Treaty of 1856. The total claimed is $167,323.06."

Petitioner has set forth above the balances shown by the Government's accounting to be due and owing to petitioner under the several treaties in issue.

Bogert on Trusts and Trustees (1948 Ed.), Vol. 4, Pt. 2, Sec. 969, pp. 297, 299, states:

> "It is elementary that the cestuis and other interested parties should be given an opportunity to examine the account and object to any item. * *
>
> "The issues are framed by the account and the objections thereto."

See also In re *Tretheway's Estate* (1939, Cal.), 89 P.2d 679, 682; *Florida Fruit Canners* v. *Walker* (1937, 5 C.C.A.), 90 F.2d 753, 758; *Harrison* v. *Remington Paper Co.* (1905), 140 F. 385, 402. As was stated in *Florida Fruit Canners* v. *Walker*, supra, at p. 758:

> "* * A trustee has the burden of establishing the correctness of his account because either the charges in that account are a matter of record, are admitted in the account, or are solely within the knowledge of the trustee; and the trustee is undertaking to satisfy those charges against him by proof of allowable cred-

its in his favor. When it is established that a certain value has come into his possession by virtue of the trust relation, he has the burden of showing that that value is offset by a proper credit in his account. * * *"

See also *McComb* v. *Frink* (1893), 145 U.S. 629, 644.

The parties agreed, except with respect to the claim under the 1833 Treaty, on the total amount of the obligations of the United States to the Creek Nation under each of the treaty provisions in question, and the Government's accounting report clearly sets forth the total disbursements made by the United States under these total treaty obligations. The balances herein claimed constitute the differences between the total treaty obligations owing to the Creek Nation, and the total amounts actually disbursed by the United States in fulfillment thereof, as disclosed in the Government's accounting report. The petitioner thus supported the claims herein presented, by the Government's own accounting report.

3.

The United States as the Fiduciary Has the Burden of Proving the Credits It Claims

Petitioner contended before the Commission, and on appeal in the Court of Claims, that the United States, as the fiduciary, had the burden of proving the credits it claimed against the specific balances shown by its own accounting report to be due the Creek Nation under the treaty obligations in issue.

The Indian Claims Commission stated in its opinion (7 Ind. Cl. Comm. at p. 132; R. 277):

"* * * we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether

> the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as guardian or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor."

The dissenting opinion of Judge Littleton defined the issue, as it relates to petitioner's claims under the Treaties of 1802 and 1805, as follows (R. 296):

> "Appellee's contention is that, because appellant did not show that any of this $99,461.45 was *not* paid in satisfaction of the obligations of the 1802 and 1805 Treaties, the Government is entitled to credit the entire amount against its obligations under those treaties. The $99,461.45 exceeds the $98,857.50 claimed by appellant to be due, so appellee's theory would defeat recovery under these two treaties. The Indian Claims Commission adopted the Government's position and determined that nothing was due to appellant. 7 Ind. Cl. Comm. 117.
>
> "Appellant argues that the relationship between the United States and an Indian tribe is such that the Government has the burden of presenting an accurate accounting of its payments to appellants pursuant to the treaties in question. Appellant maintains, therefore, that the Government is not entitled to credit for any amounts not specifically allocated on its books to fulfillment of these treaties."

The fallacy of the Commission's holding, affirmed by the majority of the Court of Claims, is quite apparent: (1) it denies the general fiduciary relationship existing between the parties which the decisions of this Court hold arises out of the great disparity of the parties; (2) it places upon petitioner the burden of proving the credits claimed by the fiduciary, whereas the law places upon the fiduciary the burden of proving its own claimed credits; and (3) it charges petitioner with the entire amount of disbursements made under the Treaty of 1790

against the Treaties of 1802 and 1805, without taking into account the obligations of the United States under the 1790 Treaty, and the Secret Article thereof; and (4) it requires the petitioner to prove a negative, when the proof of such facts is solely within the knowledge and control of the respondent, and not within the knowledge of petitioner.

The holding of the Indian Claims Commission, as affirmed, would impose upon the Indian tribe the burden of proving a negative--that the tribe did not receive the balances claimed to be due under the treaties in question, when the Government's own accounting report shows that the United States failed to disburse said balances in fulfillment of the obligations it assumed under these treaties. In other words, the tribe would be charged with explaining the government's accounting, and with endeavoring to allocate the disbursements shown therein, which the Government's own accounting officers cannot definitely allocate to any particular Creek treaty obligation. It can well be wondered how an Indian tribe, unfamiliar with the accounting methods of the United States, and ignorant of the English language, could explain the ambiguities contained in the Government's own accounting report, which defendant's own accounting officers state they are unable to do themselves.

As Judge Littleton's dissenting opinion pointed out, the Sioux Case, supra, clearly settled the question of whether the United States or an Indian tribe, has the burden of proof in such accounting matters. Judge Littleton, also wrote the decision of the Court of Claims in the Sioux Case, ~~and in his dissenting opinion in the instant case,~~ Case in which the Court of Claims clearly held that:

> "• • • The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting." 105 C. Cl. at p. 802.

The views of Judge Littleton are consistent with the well settled principles governing an accounting by the guardian to his ward. In *Bogert, Trusts and Trustees* (1948 Ed.), Vol. 4, Part 2, Sec. 962, pp. 239-242, it is stated:

> "'To keep an accurate account is one of the primary duties of a trustee. The general rule of law applicable to a trustee burdens him with the duty of showing that the account which he renders and the expenditures which he claims to have made were correct, just and necessary. • • • He is bound to keep clear and accurate accounts, and if he does not the presumptions are all against him, obscurities and doubts being resolved adversely to him.'"
>
> • • • •
>
> "The principal penalty usually stated to apply to a trustee who fails to keep proper records of his trust is that 'all presumptions are against him' on his accounting, or that 'all doubts on the accounting are resolved against him.' • • •
>
> "• • • If he claims that he made payments to creditors or cestuis, these disbursements are disputed, and the trustee has no written evidence to substantiate his position due to a faulty record system, the court will tend to disallow the item. Had the trustee performed his duty by taking receipts of vouchers, he could have made a clear case for the disbursements. His failure to present such evidence casts suspicion on the claim and renders the court unwilling to hold that he has borne the burden of proving the payment by a preponderance of the evidence.
>
> • • • •
>
> "If the trustee claims that he kept an account book but that he has lost it, it has been held that he must bear the burden of proving the payments which he alleges were shown by the book, and that doubts will be resolved against him. • •"

In the footnote at pages 244-245 it is further stated:

> "It is well settled that when a fiduciary relation is shown to exist, and property or property interests

> have been intrusted to an agent or trustee, the burden is thrown upon such agent intrusted to render an account and to show that all his trust duties have been fully performed, and the manner in which they have been performed. It is assumed that the agent or trustee has means of knowing and does know what the principal or cestui que trust cannot know, and is bound to reveal the entire truth. * * * It is not necessary in such a case as this that the plaintiff should show that there will be something found due to her on the accounting. That fact can never be known with certainty until the account has been taken. The right to this accounting results from the facts that the fiduciary relation has been created and assumed by the agent or trustee and that the principal or cestui que trust is not informed and does not know what has been done with reference to the property or property interests confided to the agent or trustee. Frethey v. Durant, 48 N. Y. S. 839, 24 App. Div. 58, 61, 62."

And Section 971, p. 328, states:

> "The burden is on the accounting trustee to prove to the satisfaction of the court the merit of all claims for credit which he makes. * * *"

See also the *Restatement of the Law of Trusts, American Law Institute*, Vol. 1, Sec. 172, pp. 445-446; *Pomeroy's Equity Juris.* (4th Ed.) Vol. 2, Sec. 956, pp. 2038-2042.

It is well settled that the trustee has the burden of proving the credits claimed by him. *Talbot* v. *Automobile Identification Underwriters, Inc.* (1931, Tenn.) 43 S.W. 2d 220, 221; *Smith* v. *Tolversen*, (1934 Minn.) 252 N.W. 423, 425; *Florida Fruit Canners* v. *Walker* (1937), 90 F. 2d 753, 758; *Smith* v. *Robinson*, (1914, 83 N. J. Eq. 384), 90 A. 1063, 1065.

It is also well settled that if the trustee loses his accounts he must bear any resulting damage, *Benbow* v. *Benbow*, (1934, 117 Fla. 37), 157 So. 512, 519; and the difficulty in making proof of expenses and disbursements by

the trustee is no reason why the rule of strict accountability should be relaxed. *Bennet* v. *Weber* (1926, 323 Ill. 283), 154 N.E. 105, 110.

We submit that the petitioner has amply proven its case by alleging and proving the total extent of the Government's treaty obligations, and further showing by the Government's own accounting records, that the total obligations of the Government have not been fulfilled. Clearly the Government must be held to be responsible for the ambiguities in its own accounting, in view of its duty as the fiduciary to render clear and accurate accounts of the amounts disbursed in fulfillment of its treaty obligations to an Indian tribe.

The dissenting opinion of Judge Littleton pointed out that the obligation of the United States under the Treaty of 1790 was at least $1,500 per year, and for the years 1790 through 1797, and 1800 through 1809, a total of eighteen years, the Government's records do not specifically show payment of this $1,500 annuity, and that at least $27,000 of the payments made from 1803 to 1818 were made in fulfillment of the 1790 Treaty obligation; and that of the $99,461.45 shown by the Government's accounts to have been paid to the Creeks, but not allocated to specific treaties, at most $72,461.45 can be credited to the Government as fulfillment of its obligations under the Treaties of 1802 and 1805, leaving a balance of $26,396.05 which is not shown to have been paid. (R. 307). However, the dissenting opinion concludes (R. 307):

> "• • • In addition, I think that appellant should be permitted, upon a remand to the Indian Claims Commission, to show any other obligations of the United States, in addition to the $1,500 under the 1790 Treaty, for which the payments shown for 1803 through 1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which I find to be the maximum allowable to the Government against its 1802 and 1805 treaty obligations, given the state of its records."

We believe that even this burden petitioner should not bear, and in this instance petitioner differs from the dissenting opinion. It must be remembered that the respondent injected into the case the disbursements under the Treaty of 1790, in order to show credits due it on the balances shown to be due petitioner under the Government's obligations under the Treaties of 1802 and 1805. However, the Government had assumed obligations under the 1790 Treaty, other than the $1,500 annual payment. Under Article XII it obligated itself to furnish "from time to time gratuitiously the said nation with useful domestic animals and implements of husbandry"; and under the secret article agreed to pay the Creek chiefs an annual stipend for life, in the amount of $1,200 to Alexander McGillivray, and to each of 6 other Chiefs $100 a year for life, or $600.00 annually (R. 197). We submit that if the respondent is entitled to credit in any amount shown by its accounting as disbursements under the 1790 Treaty, it must prove that it is entitled to further credits against the Government's obligations under Treaties of 1802 and 1805 out of the net balance of $72,461.45. Certainly it is better able to explain it own accounting records, and what these disbursements were for than petitioner, and if it cannot prove that it is entitled to further credits from this amount of $72,461.45 the presumptions are against the fiduciary, and it would be entitled to no further credits against the 1802 and 1805 Treaty obligations.

As the statute of limitations is waived by the Indian Claims Commission Act the claims are to be considered as if they developed today.

Quite apart from the duty of the United States as the fiduciary to account as such, an independent principle places the burden upon the United States here. It is established that the funds in question came into the Government's hands; that it alone has the books of account to explain what happened to the funds; and if the negative

averment of non-payment be not true, it is peculiarly within the Government's hands to establish the fact. As a result, the burden is squarely on the United States for

> "• • • It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev. sec. 79, 'that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative. • • •" *United States* v. *Denver & R.G.R.R. Co.* (1903), 191 U.S. 84, 92.

To the same effect is *Colorado Coal and Iron Co.* v. *United States* (1887), 123 U.S. 307, 318-320. *Rossi* v. *United States* (1933), 289 U.S. 89, 91-92.

As shown by the foregoing citations, the United States is subject to this rule of evidence. And the rule has been flatly held to apply in accounting cases, as where a surviving partner, with the books of account, has it peculiarly within his knowledge or means to make the accounting. *Cleit* v. *Scott* (C.C.A. 5th, 1939), 102 F.2d 725. See also, *Merriam* v. *Venida Blouse Corporation* (S.D.N.Y., 1938), 23 F.Supp. 659, 660-661; *United States* v. *Bull Steamship Line*, (S.D.N.Y., 1956), 146 F.Supp. 210, 213.

The dissenting opinion also pointed out (R. 293):

> "• • • Moreover, I am of the opinion the Commission has not followed the principles of the decided cases nor the rules of this court with respect to bur-

den of proof where the Government sets up and relies on the affirmative defense of payment (Rule 15(b) of the Rules of the Court of Claims)."

Furthermore, Section 2 of the Indian Claims Commission Act, provides in part that "the Commission shall make appropriate deductions for all payments made by the United States on the claim". It is now well settled that under this provision of the Act the United States has the burden of proving the credits it asserts against the claims presented by the petitioner. *Menominee Tribe* v. *United States* (1951), 118 C. Cls. 290, 326; *Kiowa, Comanche and Apache Tribes*, 5 Ind. Cls. Comm. 297, affirmed *United States* v. *Kiowa, Comanche and Apache Tribes* (1958) 143 C. Cls. 534, 543.

4.

The Majority of the Court of Claims Failed in Its Duty as an Appellate Court under Section 20(b) of the Indian Claims Commission Act to Determine Whether the Findings of the Commission Are Supported by Substantial Evidence When the Findings Are Challenged on Appeal

Petitioner assigned as error and contended before the Court of Claims on appeal that the Indian Claims Commission failed to make proper findings of fact essential to the proper disposition of the claims under the Treaties of 1802 and 1805, 1832, 1833, and 1856, and made findings not supported by the substantial evidence in the record with respect to petitioners claim under the 1856 Treaty (R. 284-291).

The majority of the Court of Claims failed completely to review the record and decide whether the findings of the Commission were supported by substantial evidence, or whether the Commission made findings essential to the proper disposition of the claims herein presented, as it was in duty bound to do under Section 20(b) of the Indian Claims Commission Act.

The dissenting opinion states (R. 293-294):

"• • • Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligation which, until this time, the court has conscientiously fulfilled. The appeal by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not disregarded or overlooked the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's appellate function in claims appealed from the Indian Claims Commission to be like that of the Circuit Court of Appeals in appeals from the District Courts, 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. It provides:

> "On said appeal the Court *shall* determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. • • • [Emphasis supplied.] 25 U.S.C. § 70s(b).

In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail."

However, the dissenting opinion of Judge Littleton, joined in by Judge Madden, did review the whole record and pointed out the shortcomings of the findings of the Commission with respect to each of the claims in question (R. 307-315). We review the facts disclosed by the record that should have been considered by the Commission in determining this case.

Claim Under Treaties of 1802 and 1805

As pointed out by Judge Littleton, the Commission charged against the balance of $98,857.50, shown by the Government's accounting report to be due petitioner under the 1802 and 1805 Treaties, the total of the unallocated items which could not be identified with these treaties, or $99,461.45, and thus offset the amount due petitioner under them; but in doing so failed to find facts relating to the obligations under the Treaty of 1790, which were shown not to have been fulfilled during the period 1790 through 1810 (R. 307). The dissenting opinion pointed out that at least $26,396.05 was due petitioner under the provision of the 1790 treaty requiring the Government to pay $1,500.00 per annum as a permanent annuity over this period (R. 307), leaving a balance of $72,461.45, of the unallocated items, which possibly could be charged against the balance of $98,857.50 due under the 1802 and 1805 Treaty obligations of the United States (R. 307-308). Judge Littleton further suggested that the case should be remanded to the Indian Claims Commission to permit appellant to show any other obligations of the United States, in addition to the $1,500 annuity under the 1790 Treaty, for which the payments shown for the years 1803 through 1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which he found to be the maximum allowable to the Government against its 1802 and 1805 Treaty obligations (R. 307-308).

The dissenting opinion, therefore, recognizes that there were other obligations of the United States under the Article XII of the 1790 Treaty requiring it to furnish the Creek Nation with useful domestic animals and implements of husbandry, and to supply interpreters; and also the obligation under the secret article of this treaty to pay yearly stipends to Creek Chiefs during the period of their lives, which could make up considerable of the $72,461.45 balance. (R. 197, 215). For instance, the record shows that three of the medal chiefs were still living in 1811, and that the United States estimated payments due them of $300.00 for that year (R. 219-220, 226, 230-231). Also the letter of Benjamin Hawkins, United States Agent for the Creek Nation, to the Secretary of War, dated July 9, 1807, states in part, "I have heard nothing of the goods or articles deemed necessary for the plan of civilization for the present year. The agricultural part is retarded for want of the hoes, however the supply will be equally useful the ensuing year" (R. 215), indicating clearly that such items were forwarded or expected to be forwarded under Article XII of this treaty.

We submit that in view of the fact that the respondent injected the 1790 Treaty payments into the case in order to show credits due it, that it, as the fiduciary, has the burden of showing that any of the $72,461.45, or the balance of the unallocated items, was due as a credit on the balance of $98,857.50 shown to be due petitioner on the Government's 1802 and 1805 Treaty obligations.

As the Commission made no findings with respect to the unfulfilled obligations of the United States under the Treaty of 1790 and the secret article thereof, we submit that the Court of Claims should have remanded the case to the Commission for such essential findings.

Claim Under Treaty of 1832

Judge Littleton further pointed out that the Commission failed to make essential findings of whether or not the

Government's obligation under Article XIII of this treaty had been fulfilled, and stated (R. 308):

> "I think that the Commission's failure to find whether the 1832 Treaty obligation was fulfilled requires us to remand this portion of the case to the Commission for such a finding. On its face, the Commission's 'finding' is merely a restatement of the Government's contention, and not a finding at all.
>
> "The Commission's 'ultimate' finding that there was not sufficient evidence in the record to show that any of the indebtedness claimed by appellant had not been discharged does not remedy its failure to make a material finding of fact. Where required findings are not made by the Commission, the court will set aside the Commission's final determination and remand the case so that such findings may be made. Snake or Piute Indians v. United States, 125 Ct. Cl. 241, 255."

Claim Under Treaty of 1833

With respect to the claim under the Treaty of 1833, Judge Littleton stated (R. 309-310):

> "The Indian Claims Commission concluded that it was unnecessary for it to determine whether the basis for establishing the treaty liability as contended for by appellant was correct, in view of its holding that appellant had 'not proven the alleged failures of the appellee to fulfill its obligations * * *'. 7 Ind. Cl. Comm., 138. Since I would conclude that appellant has laid sufficient basis for a conclusion that appellee failed to fulfill its obligations, I think that it was necessary for the Indian Claims Commission to determine the amount of the Government's obligation under the 1833 Treaty. I would therefore remand this portion of the case to the Commission for such determination."

We submit that this is a correct conclusion to be reached with respect to the Commission's failure to make essential findings necessary to the proper disposition of this claim.

Claim Under Treaty of 1856

Judge Littleton pointed out in the dissent that with respect to petitioner's claim under the Treaty of 1856, the Commission's finding—that the $29,000 balance due the Creek Nation as interest on the $200,000 trust fund, provided for in Article VI of the Treaty of August 7, 1856, 11 Stat. 699, was paid to the Creek Nation—was not supported by substantial evidence, and that the evidence in the record does not support the finding that this payment was made to the Creek Nation.

The respondent claimed credit for two separate payments of the $29,000 due: (1) the payment made by the Confederate States, and (2) payment of said amount to refugee Indians, not necessarily Creek refugee Indians (R. 33-34), under the Civil War Resolution of February 22, 1862, 12 Stat. 614, and ratified by the Creek Nation by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790. (R. 310, 313).

Judge Littleton reviewed the entire record, compared it with the findings of the Commission, and set forth the facts as follows (R. 310-315):

> "* * * Appellant claims that the stipulated interest for the years 1857 through 1861, inclusive, a total of $50,000, was appropriated by Congress but that appellee's records show distributions of only $21,000 pursuant to this obligation. Appellant claims the balance of $29,000. Appellee claims credit for two separate payments of the $29,000.
>
> "(1) First, appellee claims that the $29,000 was paid to the Creek Nation by the Confederate States of America, pursuant to the treaty, dated July 10, 1861, between the Confederate States and the Creek Nation. Appellee asserts that the Creek Nation's acceptance of the payment by the Confederate States of the payment by the Confederate States of the United States' obligation discharged the United States liability.

"Appellant does not contest appellee's proposition of law, but denies that there was proper payment or, if there was, that it was validly accepted by the Creek Nation.

"The Indian Claims Commission found:

> 'In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States.
>
> 'The Confederate States paid the $29,000 and plaintiff accepted the same.
>
> 'The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866.'

"Appellant argues that the Treaty of July 10, 1861, between the Creek Nation and the Confederate States, concluded at North Fork Village on the North Fork of the Canadian River, west of Arkansas, which provided for the payment of the $29,000 by the Confederate States, was only approved by some of the Creek chiefs without the action of the Creek Council, the governing body of the Creek Nation, and that the Creek Nation was about evenly divided in sympathies between the Union and the Confederacy. [R. 145, 155-157, 161, 166].

"I do not think that there is any evidence that the $29,000 was paid to the Creek Nation. The evidence shows that in Article XLI of the 1861 Treaty the Confederate States agreed to pay the $29,000 [R. 256-257]; that the Provisional Congress of the Confederate States appropriated the $29,000 on December 24, 1861 [R. 257]; that on December 30, 1861, that amount was requisitioned by J. P. Benjamin, the Confederate Secretary of War, from the Confederate Secretary of the Treasury [R. 259]; that on the same date C. G. Memmenger, the Secretary of the Treasury, ordered

a War Department Warrant No. 16 to be issued in favor of General Albert Pike, a War Department agent, for delivery to Major Elias Rector, Superintendent of Indian Affairs [R. 259]; that on January 1, 1862, S. S. Scott, Acting Commissioner of Indian Affairs, wrote to Major Rector at Fort Smith, Arkansas, informing him that the money was in the hands of General Pike for delivery to him [R. 261]; and that on January 28, 1862, General Pike wrote to Major Rector from Little Rock, Arkansas, informing him that he supposed he would reach Fort Smith in six days [R. 262-263]. It is true that there is no receipt for the $29,000, but in the light of the evidence which I have detailed, I think it was not improper for the Indian Claims Commission to conclude that the money was received by the Indians. See *Chickasaw Nation* v. *United States*, *supra*, 103 Ct. Cl. at 35.

"However, although the evidence may be sufficient to support a finding that a payment of $29,000 was made to some Creek Indians, there is no indication that this payment was made to the Creek Nation, as distinguished from some portion thereof. The obligation here was owed to the Creek Nation, and could not be satisfied by payment to any party other than the Creek Nation. Debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority. Therefore, a payment to any party other than the Creek Nation, even if that party was some portion of the Creek Nation, cannot have satisfied the obligation owed to the Creek Nation unless the party receiving payment was authorized to receive it on behalf of the Creek Nation. The evidence upon which appellee relies to show payment indicates that no payment was made to any party before January 28, 1862, on which date General Pike, the Confederate representative charged with delivering the money to the Creeks, was still at Little Rock, Arkansas [R. 262-263]. The evidence also indicates that after the treaty with the Confederacy had been signed on July 10, 1861, a considerable portion of the Creek Nation, under the leadership of Opoeth-le-yo-ho-la, was in sympathy with the Union. This group met in convention on August 5 and de-

clared that the chiefs who had signed the Confederate treaty had forfeited their administrative rank [R. 161]. A 'Non-Treaty Party' moved westward to avoid the reach of those who were sympathetic to the Confederate cause, and sent messengers to confer with representatives of the United States [R. 161-166]. The evidence also shows that by November 15, the Union-minded Creeks had withdrawn further north, toward the southern border of Kansas, and that they fought a series of battles with Confederate forces along the shores of the Arkansas and Verdegris Rivers throughout November and December of 1861 [R. 140-146, 165-174]. The size of the group with Opoeth-le-yo-ho-la is estimated at around 2,000 men, plus women, children, and the sick and aged, in a total number of perhaps 6,000, estimated to be from one-half to three-fourths of the Creeks [R. 140-141, 145-146, 166, 183]. It also appears that during the months of November and December representatives of the refugee Creek groups were treating with United States agents for relief for the refugees and arranging for the rendering of military assistance by the Creeks to the United States [R. 142-144, 148, 175-184].

"It seems to me to be clearly established by the evidence that the Creek Nation had become divided into two independent entities. It cannot be said that the portion which remained in the South constituted, after some time in November of 1861, the Creek Nation. Payment to this southern group cannot be said to have been payment of the obligation which was owed to the Creek Nation.

"The record is barren of any evidence to show payment to an entity which could be called the Creek Nation, since it shows, as pointed out by appellee, that payment was made somewhere in the vicinity of Little Rock, Arkansas (that is, at the camp of the Southern group) some time after January 28, 1862 (that is, when the Creeks remaining in that vicinity no longer constituted the Creek Nation).

"(2) The basis for appellee's second claim of credit for a second payment of the $29,000 is that the United States authorized payments, out of Creek annuities

which had not yet been paid, for the benefit of refugee Indians during the Civil War, Resolution of February 22, 1862, 12 Stat. 614; that the $29,000 here in question was so used; and that the use of the annuities for that purpose was ratified and confirmed by appellant by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790.

"The Supreme Court's decision in *Seminole Nation* v. *United States*, 316 U. S. 286, 290-291, supports appellee's legal position, if in fact the $29,000 here in question has been shown to have been disbursed for the benefit of refugee Indians. In the *Seminole* case this court had found that the $61,563.42 in question had been diverted *and disbursed* by the Government.

"While it is clear that payments were made by the United States for the benefit of refugee Indians, I do not think that there is substantial evidence in this case to support a finding that *the $29,000 in issue* was in fact paid to refugee Indians. I note that the Indian Claims Commission did not so find. It found only that the United States Congress had approved such payment for the benefit of refugee Indians," 'which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).'

"The Treaty of 1866 approved and confirmed *expenditures made* by the United States since the diversion of annuities for that purpose. The fact that other annuity money was diverted for payment to the refugees does not establish that the United States' obligation for this $29,000 was released.

"The evidence in this case shows that $343,321.17 was disbursed by the United States, during the years 1862 to 1867 for the relief of refugee Indians, under the appropriation entitled 'Fulfilling Treaties with Creeks.' Appellee says that Creek treaties in force during that period provided for a total of $229,260 in annuities payable to the Creeks. This figure appears

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"[2] The approval was not specifically of the $29,000, but of all 'annuities payable to the * * * Creeks * * * and which have not been paid.' Resolution of February 22, 1862, 12 Stat. 614."

to have been taken from the total amounts appropriated under Creek treaties by Congress in the fiscal years 1862-1866.

"Appellee argues that because the amount expended for the relief of refugee Indians exceeded the total of the United States' obligations for the period in question by more than $29,000, the $29,000 due under Article VI of the Treaty of 1856 is shown to have been expended for the refugee Indians. This does not follow at all. There may well have been other outstanding treaty obligations which formed the basis for the 1862-1867 expenditures. Indeed there must have been, since the excess of expenditures over current treaty obligations was considerably more than $29,000.

"Unless, upon remand to the Indian Claims Commission, appellee could show that the $29,000 due under the 1856 Treaty was among the sums disbursed in 1862-1867, either by pointing to an explicit accounting for that obligation, or by showing that the total of the treaty obligations payable to the Creeks was not greater than the amount of 1862-1867 expenditures in excess of current obligations, or otherwise, I think that appellant is entitled to recover the $29,000."

Therefore, the Commission failed to find the essential facts set forth above in the dissenting opinion of Judge Littleton, and found facts which were not supported by the substantial evidence in the record.

It is well settled that the failure of the lower court to make essential findings of fact, or makes findings not supported by substantial evidence, are reversible errors. *Seminole Nation* v. *United States* (1942), 316 U. S. 310, 316; *Snake or Piute Indians* v. *United States* (1953), 125 C. Cls. 241, 255.

Therefore, we submit that this case should be reversed and remanded for this further reason, and that the Commission be directed to make proper findings essential to

the proper disposition of the claims herein presented, and in accord with the substantial evidence in the record.

The views of the dissenting opinion above quoted are supported by well settled principles of law. The Creek Nation divided into two independent parties: one, constituting the majority, that maintained its loyalty to the United States and became its ally; and the other, constituting the minority, that joined the Southern cause.

Vattel states (Book III, Ch. XVIII, pars. 292, 293; Chitty Ed., p. 424):

> "When a party is formed in a state, who no longer obey the sovereign, and are possessed of sufficient strength to oppose him,—or when, in a republic the nation is divided into two opposite factions, and both sides take up arms,—this is called a civil war. • • •"
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> • • • •
>
> "A civil war breaks the bands of society and government, or, at least, suspends their force and effect: it produces in the nation two independent parties, who consider each other enemies, and acknowledges no common judge."

And at page 427: he states:

> "But, when a nation becomes divided into two parts absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in every respect, as a public war between two different nations."

In *Conners* v. *United States* (1898), 33 C. Cls. 317, 325 the Court said:

> "• • • it must likewise be held that where the United States engages in war with a distinct portion of a tribe, acting independently of the tribe over which the tribe can exercise no control, being in fact a distinct military command, the tribe in amity can not be held responsible for the act of the hostile Indians."

In affirming this case this Court in *Conners* v. *United States* (1901), 180 U. S. 271, 275-276, stated:

"While the ghastly facts of this case, which are set forth with much greater detail in the opinion of the Court of Claims, appeal strongly to the generosity of Congress to recompense those who have suffered by the inconsiderate and hasty action of the troops in dividing these Indians into hostility, they afford no ground whatever for a judgment against the tribes to which these Indians originally belonged, but from which they had separated and carried on independent operations. In fact, it would be highly unjust to add to their manifest sufferings the payment of these damages from their annuities, or for other funds standing to their credit. * * That band itself was beyond the control of the tribes to which it originally belonged is equally clear. As stated by the court below, 'It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States, but it was the case of an entire body waging armed resistance, with all its might and will all the ferocity of Indian warfare, against whatever power the United States could bring to bear upon them. * * *.'"

To the same effect is *Montoya* v. *United States* (1897), 32 C. Cls. 349, affirmed by this Court in *Montoya* v. *United States* (1901), in 180 U. S. 261, 268, in which this Court stated:

"* * * On the other hand, if the marauders are so numerous and well organized as to be able to defy the efforts of the tribe to detain them, in other words, to make them a separate and independent band, carrying on hostilities against the United States, it would be obviously unjust to hold the tribe responsible for their acts. It can hardly be supposed that Congress would impose a liability upon tribes in amity with the United States, for the acts of an independent band, strong enough to defy the authority of the tribe, although it would not be inequitable to hold the tribe liable for individual members whom it was able, but had failed, to control."

Clearly, the minority portion of the Creek Nation that joined the South, and acted independently of the majority portion of the Creek Nation that remained loyal to the United States and became its ally, and fought three battles with the majority portion of the Creek Nation, did not constitute the Creek Nation, as Judge Littleton clearly pointed out in the dissenting opinion.

Furthermore, the respondent's own accounting shows that most of the $343,321.17 of Creek annuity moneys diverted for refugee Indians during the Civil War period, was not disbursed for Creek refugees. (R. 33-34).

5.

A Denial of a Writ of Certiorari by This Court Does Not Constitute an Affirmance of the Decision of the Lower Court

The Indian Claims Commission relied largely upon the decision of the Court of Claims in *Chickasaw Nation* v. *United States* (1945), 103 C. Cls. 1, instead of later opinions of the Court of Claims overruling the Chickasaw Case, and gave as its reason that the Chickasaw Case decision was affirmed by a denial of certiorari by this Court.

In reviewing the Indian Claims Commission opinion, as affirmed by the majority of the Court of Claims, the dissenting opinion of Judge Littleton stated (R. 300-301):

> "The Indian Claims Commission relied heavily, in its decision of this case, upon *Chickasaw Nation* v. *United States*, 103 Ct. Cl. 1, certiorari granted, limited to question of specific designation of offsets, and judgment reversed, 326 U. S. 217. That case does support appellee's position, but does not have the weight attributed to it by the Indian Claims Commission as a result of the Commission's misconception of the meaning of the Supreme Court's denial of certiorari as to the issues relevant to this case.

"In *Chickasaw* the Government's records showed that it had purchased annuity goods for various tribes, but did not show how much of these goods had been allocated to the Chickasaws as distinguished from the other tribes. This court said, 'Unless this allocation is known, the shortage, if any, in the goods annuity of $3,000 cannot be ascertained. The accounts show no shortage for which judgment may be given.' 103 Ct. Cl. at 35-36. It should be noted, however, that the problem did not receive extended consideration by this court in *Chickasaw*. The Indian Claims Commission, however, in relying upon *Chickasaw* rather than upon more recent decisions of this court which support the conclusion which I would reach, stated that 'The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in *Chickasaw*] is evidence that it approved the holdings of the Court of Claims in reference to such matters.' 7 Ind. Cl. Comm. at 135. The Commission went on to say that the decision of this court in *Sioux Tribe of Indians* v. *United States*, 105 Ct. Cl. 725, *infra*, 'could not overrule the [*Chickasaw* case] because the *Sioux* case is a Court of Claims opinion only, while the holdings in the *Chickasaw* case were approved by the Supreme Court by its refusal to grant a writ of certiorari.' 7 Ind. Cl. Comm. at 137.

"The Supreme Court has made clear that no such inference is to be drawn from its denial of certiorari in any case."

The dissenting opinion supports this point by citing the following cases in which this point has been passed upon by this Court (R. 301, footnote 4):

"*United States* v. *Shubert*, 348 U. S. 222, 228-229; *Sunal* v. *Large*, 332 U. S. 174, 181; *House* v. *Mayo*, 324 U. S. 42, 48; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401, 403-404; *United States* v. *Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.*, 240 U. S. 251, 258. See also dissenting opinion of Mr. Justice Frankfurter in *Darr* v. *Burford*, 339 U. S. 200, 226-228, where he stated at page 226:

> "'The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.
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> • • • •
>
> "'Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner.'"

Clearly the dissenting opinion of Judge Littleton, concurred in by Judge Madden, is correct in its statement of the law on this point, and the Indian Claims Commission and the majority of the Court of Claims were in error.

CONCLUSION

For the reason set forth above we submit that the case should be reversed and remanded with instructions to the lower tribunals to follow the decisions of this Court holding that a fiduciary relationship does exist between the United States and the Indian tribes, in this case the Creek Nation; and with the further direction that they determine the issues in this case on the basis of the most exacting fiduciary standards; and with further direction to find facts which are essential to a proper disposition of these claims, and in accordance with the substantial evidence in the record.

Respectfully submitted,

THE CREEK NATION, Petitioner

PAUL M. NIEBELL

Attorney for Petitioner

APPENDIX

SECRET ARTICLES OF THE TREATY OF PEACE AND FRIENDSHIP

New York, August 7, 1790

George Washington, President of the United States of America and the Creek Nation of Indians

Additional secret articles to the Treaty of Peace and Friendship with the Upper Creeks, Lower Creeks, and the Semanolees

Typescript of MS, Unpublished Treaty, Archives No. 17, in U.S. Department of the Interior, Office of the Solicitor, *Statutory compilation of the Indian law survey: a compendium of Federal laws and treaties relating to Indians*. Edited by Felix S. Cohen, Chief, Indian Law Survey. Part 5: Indian Treaties (1778-1817). Mimeo. Washington. 1940.

Unpublished Treaty
Archives No. 17
August 7, 1790

GEORGE WASHINGTON
PRESIDENT OF THE
UNITED STATES OF AMERICA
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETINGS

WHEREAS the treaty of peace and friendship, between the United States of America and the Creek Nation of Indians made and concluded on the seventh day of the present month of August, Contains certain secret articles, which are in the form and words following:

SECRET ARTICLES OF THE TREATY OF PEACE AND FRIENDSHIP

Made and concluded on behalf of the United States of America on the one part, and the Creek nation of Indians on the other part in the City of New York, on this seventh day of August, one thousand seven hundred and ninety.

ARTICLE I.

The commerce necessary for the Creek nation shall be carried on through the ports, and by the citizens of the United States, if substantial and effectual arrangements shall be made for that purpose by the United States, on or before the first day of August one thousand seven hundred and ninety two. In the mean time, the said commerce may be carried on through its present channels and according to its present regulations.

And Whereas the trade of the said Creek nation is now carried on wholly or principally through the territories of Spain and obstructions thereto may happen by war or prohibitions of the Spanish government:

It is therefore agreed between the said parties that in the event of any such obstructions happening it shall be lawful for such persons as the President of the United States shall designate to introduce into and transport through the territories of the United States to the country of the said Creek nation, any quantity of goods wares and merchandise not exceeding in value in any one year Sixty thousand dollars, and that free from any duties or impositions whatsoever, but subject to such regulations for guarding against abuse, as the United States shall judge necessary; which privilege shall continue as long as such obstructions shall continue.

ARTICLE II.

The United States also agree to allow to each of the great medal chiefs herein after named, a commission, a great medal with proper ornaments, and each one hundred dollars annually for themselves and the other beloved men of their towns respectively, to wit:

Of the Upper Creeks	The Chiefs of the Oakfuskeos, Tuckabatchees, and the present Talissee King of the half-way house.
Of the lower Creeks	The Chiefs of the Cusitahs and Cowetas—AND—
Of the Semanolees	The Chief of Micasukee

ARTICLE III.

In order to effect a consolidation of the interests of the United States and the Creek nation, it is hereby stipulated that Alexander McGillivray the beloved Chief of the said nation shall also be constituted the Agent of the United States in the said nation with the rank of Brigadier General and the pay of one thousand two hundred dollars per annum, on his taking the usual oaths required by law.

ARTICLE IV.

And the said Alexander McGillivray hereby stipulates to use his highest exertions to endeavor to cultivate the firmest friendship between the United States and the said Creek nation.

ARTICLE V.

The United States agree to educate and clothe such of the Creek youth as shall be agreed upon, not exceeding four in number at any one time.

ARTICLE VI.

These secret articles shall take effect and be obligatory on the contracting parties as soon as the same shall have been ratified by the President of the United States, with the advice and consent of the Senate of the United States.

IN WITNESS of all and every thing herein determined between the United States of America and Alexander McGillivray in behalf of himself and the Creek nation, the parties have hereunto set their hands and seals, at the place and on the day and year above written.

In behalf of the United States,

H. KNOX, *Secy. of War and sole Commissioner for treaty with the Creek Nation.*

In behalf of himself, and the Creek Nation,

ALEXANDER M'GILLIVRAY

DONE IN THE PRESENCE OF

Richard Morris, Chief Justice of the state of New York. Richard Varick, Mayor of the City of New York. Marinus Willet. Joseph Allen Smith. Henry Izard.

Now Know ye, That I having seen and considered the said secret articles of the said treaty, do by and with the advice and consent of the United States accept, ratify, and confirm the same, and every article and clause thereof; In Testimony whereof I have caused the seal of the

United States to be hereunto affixed, and signed the same with my hand.

Given at the City of New York the Thirteenth day of August, in the year of our Lord, one
[SEAL] Thousand seven hundred and ninety, and in the Fifteenth year of the sovereignty and independence of the United States.

G. WASHINGTON
By the President:

T. W. JEFFERSON

By Command of the President of the United States of America.

H. KNOX

Secretary for the department of War.

Treaty of August 7, 1856, 11 Stat. 699, 2 Kapp. 756; Ratified August 16, 1856; Proclaimed August 28, 1856.

"Art. V. The Creek Indians do hereby absolutely and forever quit-claim and relinquish to the United States all their right, title, and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi River, and any and all claim for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement; and it doth also, in like manner, release and fully discharge the United States from all other claims and demands whatsoever, which the Creek Nation or any individual thereof may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws; and which are as follows, viz: permanent annuities in money amounting to twenty-four thousand five

hundred dollars, secured to them by the fourth article of the treaty of seventh August, seventeen hundred and ninety, the second article of the treaty of June sixteenth, eighteen hundred and two, and the fourth article of the treaty of January twenty-fourth, eighteen hundred and twenty-six; permanent provision for a wheelwright, for a blacksmith and assistant; blacksmith-shop and tools, and for iron and steel under the eighth article of the last-mentioned treaty; and costing annually one thousand seven hundred and ten dollars; two thousand dollars per annum, during the pleasure of the President, for assistance in agricultural operations under the same treaty and article; six thousand dollars per annum for education for seven years, in addition to the estimate for present fiscal year, under the fourth article of the treaty of January fourth, eighteen hundred and forty-five; one thousand dollars per annum during the pleasure of the President, for the same object, under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagon-maker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; the last instalment of two thousand two hundred and twenty dollars for two blacksmiths and assistants, shops and tools, and iron and steel, under the thirteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, and which last it is hereby stipulated shall be continued for seven additional years. * * * The right and interest of the Creek Nation and people in and to the matters and things so excepted, shall continue and remain the same as though this convention had never been entered into."

"Art. VI. In consideration of the foregoing quit-claim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the

first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * *.

* * * *

"Art. XXVI. This convention * * * shall take effect and be obligatory on the contracting parties from the date hereof, whenever it shall be ratified by the Senate and President of the United States."

Treaty of June 14, 1866, 14 Stat. 785, 2 Kapp. 931; Ratified July 19, 1866; Proclaimed August 11, 1866.

Article XI. The stipulations of this treaty are to be a full settlement of all claims of said Creek Nation for damages and losses of every kind growing out of the late rebellion and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose consequent upon the late war with the so-called Confederate States; and the Creeks hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Creek Nation by the United States, and the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Creeks, to the use of refugee and destitute Indians other than the Creeks or members of the Creek Nation after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.